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In The
# Supreme Court of the United States

October Term 1997

**DARRELL V. MCGRAW, JR., Attorney General, State of West Virginia, Personally and in His Official Capacity,**
*Petitioner,*

v.

**BETTER GOVERNMENT BUREAU, INCORPORATED, an Ohio Corporation,**
*Respondent.*

**ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT**

## Petition for Writ of Certiorari

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## QUESTIONS PRESENTED

1. Whether the appeal court's decision departs from the principles that are the foundation for the doctrine of qualified immunity when it essentially places a burden upon a public official to accurately determine that their acts were within their scope of their duties under the statutes, regulations and case law that define their duties and imposes a forfeiture of qualified immunity where that decision is erroneous even where the official's misapprehension or misjudgment as to the scope of his or her authority is negligently or innocently done.

2. Whether the appeal court's determination that the application of the doctrine of qualified immunity to a state public official's actions should require an inquiry into whether he or she exceeded the scope of their clearly defined authority is a misapplication of the standards established in Harlow v. Fitzgerald, 457 U.S. 800 (1982) and followed in Davis v. Scherer, 468 U.S. 183 (1984).

## LIST OF PARTIES TO THE PROCEEDING

The following is a complete list of parties identified as plaintiff and defendant in district court and appellant and appellee in the court of appeals excluding the attorney-client issues.

Plaintiff/Appellee - Better Government Bureau, Inc. of Ohio, Roger P. Furey, Esquire, Michael B. , Esquire, E. Joseph Buffa, Esquire

Defendants/Appellant - Honorable Darrell McGraw Better Govenment Bureau of the State of West Virginia, A Body Politic, A Corporate Instumentality of Govenment with Limited Agency and Quasi-Sovereign Capacity; Ken Hechler, Secretary of State, in his Official Capacity
David P. Cleek, Esquire,
Marilyn T. McClure, Esquire.

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## PETITION FOR A WRIT OF CERTIORARI

## TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner, Attorney General Darrell V. McGraw, Jr., prays that a petition for certiorari issue to review the judgment and opinion of the United States of Appeals for the Fourth Circuit entered in this proceeding on July 16, 1997. References to the Appendix are designated as App. _

## OPINIONS BELOW

The opinion of the Court of Appeals on rehearing denial is published at 119 F. 3d. 1129 (4th Cir. 1997) App. 91-116. The original panel opinion is published at 106 F.3d 582 (4th Cir. 1996) App. 1-55. The opinion of the District Court for the Southern District of West Virginia is published at 904 F. Supp. 540 (S.D. W.Va. 1995). App. 56-79. The District Court reinstated this opinion after vacating it and is published at 924 F.Supp. 724 (S.D. W.Va. 1996). App. 80-90.

## JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit was entered on July 16, 1997. This petition is filed within 90 days of that date. The Court's jurisdiction is pursuant to 28 U.S.C. §1254.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The judgment appealed from was an interlocutory appeal under §1291, Title 28, United States Code, from a denial of a summary judgment premised upon the ground that petitioner was immune from liability for damages based upon the doctrine of qualified immunity. Respondent filed claims under 42 U.S.C. §1983, 15 U.S.C. §1125, the First and Fourteenth Amendments to the United States Constitution and various state claims. The texts of these constitutional and statutory provisions are attached, in part, in App. 118-129.

## STATEMENT OF THE CASE

This Court, recognizing the need to address the imposition on time, effort and governmental attention by unwarranted civil rights actions, determined in Harlow v Fitzgerald 457 U.S. 800 (1982) that as a means to resolve trials, the entitlement to qualified immunity should be resolved in a pretrial manner on objective factual grounds. In that case, this Court held that issue of whether qualified immunity from liability for damages existed turned on whether the defendant violated a clearly established right under a federal constitutional or statutory right which a reasonable person would have known.

In this case, a highly placed state official, the attorney general, has been sued for alleged violations of respondent's civil rights including the right of free speech, violations of trademark laws and violations of other common law and state constitutional provisions. This case involves the claims of the so-called Better Government Bureau, Inc. (BGB), an Ohio non-profit corporation, which asserts that it is a watchdog association for business and conservative interests.

The BGB of Ohio is largely controlled and was founded by an Ohio corporation, Suarez Corporation Industries (SCI), which operates sweepstakes subsidiaries which have been banned from doing business in West Virginia as a result of Attorney General McGraw's injunction suits for fraudulent activities.

The Better Government Bureau, Inc. of Ohio (BGB) was incorporated in Ohio in 1993 and was incorporated in the State of Washington in 1994. The BGB claims to be a national watchdog group for business interests but the overwhelming majority of its members are from Ohio. Many of its members are employees of SCI which provides approximately 90% of the funding for respondent's activities. These activities in West Virginia and Washington have included the filing of freedom of information suits for budgetary and other information from attorney general's offices in disputes with SCI's sweepstakes companies, investigations by private investigators and others of public officials, setting up picket lines with demonstrators carrying signs condemning a West Virginia Deputy Attorney General as a draft dodger, radio and newspaper advertisements critical of various attorney generals, including petitioner and others, who have investigated SCI's business activities and the dissemination of newsletters or articles critical of state officials. Some of BGB's articles critical of the actions of West Virginia's Attorney General were published in magazines owned by Suarez Corporation Industries (SCI). Such tactics are commonly used by the BGB. Officials of SCI are members of the board of trustees of the Better Government Bureau, Inc., the respondent here. SCI is reimbursing the BGB for its attorney's fees expended in this litigation.

After a lawsuit was filed in West Virginia courts against an SCI subsidiary and others which conducted sweepstakes activities in this state, the BGB began its activities in West Virginia. The BGB made an announcement on radio stations in West Virginia that stated:

" THIS IS AN IMPORTANT
ANNOUNCEMENT

The Better Government Bureau is investigating the actions of Attorney's (sic) General Darrell McGraw and [Assistant Attorney General] Tom Rodd.

Voters already removed McGraw from the State Supreme Court because of his poor performance.

Now we are trying to obtain public information about the Attorney General under the 'Freedom of Information Act', but it has been denied. What are McGraw and Rodd trying to hide?

If you have any information about Darrell McGraw, Tom Rodd or anyone in the Attorney General's Office, please contact the Better Government Bureau toll free at 1-800-807-9881. The number again is 1-800-807-9881.

PAID FOR BY THE
BETTER GOVERNMENT BUREAU."

The BGB also claimed it was intending to open a West Virginia office and possibly start a chapter to "crack politics in West Virginia." App. 58.

The BGB had not incorporated in West Virginia nor had it reserved the name "Better Government Bureau" by appropriate filings in the Secretary of State's office when it began its activities. Shortly after this publicity began, Attorney General McGraw had an employee of his office file documents with the Secretary of State to reserve this name. Later that same day McGraw and his employee completed the appropriate documents to incorporate a quasi-sovereign corporate agency known as the Better Government Bureau, State of West Virginia, a Government Agency Corporation. McGraw used personal funds to pay the filing fees to do so. This agency has gone through several name changes, has obtained a telephone listing and letterhead. An application for non-profit status has been undertaken and other actions have been taken although this state corporate agency has not been functioning to any extent during this litigation.

Attorney General McGraw claimed that the formation of this quasi-sovereign corporate agency was intended to conduct activities and establish programs for consumer education and related tasks which his office had authority to do under the provision of Chapter 46A, Article 7, Section 102 of the West Virginia Code which is part of the consumer protection laws in this State. The proposal for these activities included using the corporate state agency's non-profit status to raise money for such activities similar to the manner in which other agencies in this state solicit private funds for public purposes such as public radio.

About a month after Attorney General McGraw's actions, the respondent, Better Government Bureau, Inc., attempted to incorporate as a foreign corporation doing business in West Virginia. The Secretary of State rejected this effort as the name had already been used by the attorney general in incorporating the state corporate agency as an

instrumentality of the Attorney General's Office. Efforts to get this matter resolved were unsuccessful. In the meantime. Attorney General McGraw sent letters referring to respondent to 49 other attorneys general stating as follows:

> "If your office becomes involved in a sweepstakes probe, you will encounter this corporation. To foreclose the possibility of such a corporation operating in your State, you may want to register the name of the Better Government Bureau as a agent for the Attorney General's Office with the Secretary of State's Office or take other preventative measures.
>
> App. 61

In October, 1994, the BGB of Ohio filed this suit against Attorney General McGraw and Secretary of State Ken Hechler alleging that: (1) These defendants violated BGB's free speech rights and; (2) These defendants violated the Lanham Act and the common law by acts of trademark and service mark infringement. The suit requested injunctive relief and money damages. As to the constitutional claims under 42 U.S.C. §1983, the BGB sought damages only against Attorney General McGraw.

The parties filed cross motions for summary judgment and the district court granted summary judgment to Secretary of State Hechler, the West Virginia BGB and Attorney General McGraw on the state claims based upon the Eleventh Amendment immunity defense. The district court denied all other motions including Attorney General McGraw's motion for summary judgment on the defense of qualified immunity to BGB's federal claims. See App. 56-79. Attorney General McGraw appealed that ruling to the court of appeals. During the pendency of that appeal, a

secretary in the Attorney General's Office, who had surreptitiously taken a memorandum from that office, turned it over to BGB's lawyers in a secret meeting. This memorandum had not been previously provided in discovery and its existence was unknown to defense counsel.

The document directed to the Secretary of State from an assistant in the Attorney General's Office surreptitiously taken by that secretary stated:

> "The Attorney General's Office anticipates that an organization called the Better Government Bureau, out of Canton, Ohio, will shortly seek registration through your office, in order to conduct its alleged business in the State of West Virginia. When the Better Government Bureau attempts registration the Attorney General requests your office to resist and refuse such registration on the grounds that the Better Government Bureau's attempt to ply its business in our state constitutes a fraud and a deceit.
>
> Also, please inform me when the organization's application is received by your office. Thank you for your attention to this matter."
>
> App. 83..

Later, another document was discovered in the office of the Secretary of State which had not been previously disclosed in discovery. That document from the Secretary of State to an assistant in the Attorney General's Office read:

"In response to your memorandum of September 26, and after personal discussion with the Attorney General, I will be pleased to inform you when the Better Government Bureau actually attempts to register with the Secretary of State's office. The issue of resisting and refusing such registration is more complicated than I at first imagined.

I do not recall any instance when any organization has been denied registration because of its political activity. Your memorandum refers to the BGB's 'attempt to ply its business in our state as constitut[ing] a fraud and a deceit'. Without passing judgment as to whether this would constitute sufficient grounds for resisting and refusing registration. I would ask that you spell out in writing the fraud and deceit to which you refer in your September 26 memorandum.' App. 85.

This matter was remanded from the court of appeals to the district court, by stipulation, where discovery was reopened. The respondent alleged that these documents had been deliberately withheld. After additional discovery and an internal investigation, the district court reinstated its earlier order denying qualified immunity to Attorney General McGraw on the grounds that Attorney General McGraw should have known that his acts violated the First Amendment rights of BGB and that his acts were beyond the realm of his discretionary duties and were outside the scope of his authority. See App. 80-90.

The panel of the court of appeals which heard this case chose not to address the clearly established rights issue in its opinion and instead focused on the scope of authority

issue which it characterized as a matter of first impression in this circuit. The court of appeals undertook an analysis of West Virginia law to determine whether a reasonable official would have understood that forming a quasi-sovereign corporate agency "was an act clearly established to be beyond the limits of his authority" App. 1-55. The court of appeals held that when a government official acts beyond the scope of his authority, he or she received no immunity at common law and was entitled to none under § 1983. App. 20-22. After examining state law and state court decisions, the court of appeals held that there was a lack of statutory or constitutional authority for Attorney General McGraw's action and that his acts were beyond his authority. Thus, he could not claim qualified immunity. App. 91-116.

A petition for rehearing and a suggestion for a rehearing en banc was filed and denied. See App. 91-116. The vote to deny rehearing was 6 to 6 with one judge abstaining and the concurring and dissenting opinion were sharply divided. It is from that opinion, this petition for certiorari is filed.

## REASONS FOR ALLOWANCE OF WRIT

This case warrants review by this Court to resolve apparent conflicting rulings among the courts and to settle the federal question decided by the court of appeals in a manner that departs and conflicts from relevant decisions of this Court. The issues presented revolve around whether the court of appeals' holding that allows a qualified immunity defense to be forfeited where there is a finding that a defendant violated a clearly established right, including one under state law, by exceeding the scope of his or her authority is consistent with Davis v Scherer, 468 U.S. 183 (1984) and other cases. A review by this Court is required to address the incompatibility of this holding with the purposes

and design of the defense of qualified immunity for public officials performing discretionary acts.

1. The decision below departs from the principles that are the foundation of the qualified immunity doctrine in that it requires a public official to accurately determine their acts are within the scope of their authority, which is not a proper element of the qualified immunity analysis.

The opinion from the court of appeals is nothing short of a departure from the framework established by this Court to effectuate the qualified immunity determination as established in Harlow v Fitzgerald, 457 U.S. 800 (1982). It stands this Court's ruling in Davis v Scherer, 468 U.S. 183 (1984), on its head and allows the forfeiture of a qualified immunity defense if it is determined that a state official acted outside the scope of his or her state law authority. The court of appeals' ruling makes state law always relevant and perhaps determinative of the official's right to qualified immunity. This ruling allows a state official to lose qualified immunity for the failure to act within the scope of a state law or for a violation of state law. This forfeiture of qualified immunity would apparently be lost even if the official's misapprehension or misjudgment of the law caused the action to be taken.

It is difficult to formulate a more articulate and forceful argument for review of the court of appeals' ruling than the dissenting opinion written by Circuit Judge Luttig of the Fourth Circuit Court of Appeals and joined in by five other judges. In the text of the dissenting opinion, it is stated that:

"In erecting this new framework within which state law is *always* relevant and often *dispositive* of a defendant's federal right to qualified immunity, the panel quite obviously misunderstands both section 1983 and the immunity defense of Harlow. Section 1983 provides a federal cause of action against persons acting under color of state law for conduct that violates federal rights. Under Harlow, official immunity is available as against this federal cause of action if the defendant official did not violate clearly established federal, constitutional or statutory rights. Nothing else is required for entitlement to the defense and nothing else need be shown. Whether a defendant violated state law, whether he clearly violated state law, or whether he acted outside of state law, is never determinative of this federal immunity defense, because an official may lose his immunity only if he violates the statutory or other rights which give rise to the cause of action sued upon. Because the rights give rise to the section 1983 cause of action are solely federal rights - namely, the federal Constitution and federal statutes - it follows that an official can never lose his immunity through the violation of state law (even clear state law), or even through the failure to act within that law. He forfeits his official immunity *only* through the violation of clearly established federal law, as Harlow held. State law may on occasion provide *the basis* for the right that gives rise to cause of

> action under section 1983, such as where it creates a property right protected under the due process clause, but state law does not, and can never, provide the right that gives rise to the cause of action under section 1983." App. 106-107.
>
> This language sets out the primary issue that should be reviewed here.

This ruling by the court of appeals now requires a state official, as part of the burden of demonstrating that he or she did not violate the clearly established federal constitutional or statutory rights, to show that they did not exceed the scope of their state authority. Thus, the district court must not only consider the Harlow inquiry of whether the defendant violated a clearly established right, constitutional or statutory, of which a reasonable official would have known but must also decide whether an official acted outside the scope of their state law authority. State officials, who assert a qualified immunity defense, will have to show all the state statutes, regulations and court authority to support the proposition that their actions were duties within the scope of their state law authority which the dissent observed are "...duties which often will not be defined with anything approaching the specificity with which federal duties are defined." App. 109-111. The district courts will then have to analyze state law issues involving the "intricacies of state statutes, regulations and case law" to determine the qualified immunity claim. *Id.* The dissenting opinion expressed grave concerns over the "profound consequences for the principles of federalism" that such an approach would create. App. 113-115.

It would appear that this Court had similar fears when it considered the issues in Davis. In the Davis case, it was the appellee's assertion that an official's violation of a state

statute or regulation was objectively unreasonable and should deprive an official of qualified immunity. This position was proposed to be limited by a requirement that the plaintiff be compelled to allege the violation of a statute or regulation in their claim that was designed to protect constitutional rights or advance important interests. This Court stated that once the door was opened, it would be difficult to limit the scope of such inquiries and district courts would be granted considerable discretion to extract from statutes or codes the provisions the judges felt were important enough to deny qualified immunity. This approach would have required extensive inquiry and protracted litigation. Further, stated this Court, such approach would require inquiry into whether the official appreciated the applicability and importance of the rule. This approach would make it difficult for officials to appreciate the legal effects of their acts. Such an approach would require an official to know the rule and the intent with which it was adopted which this Court found to be unfair and impractical.

This Court in Davis stated that while the proposition that state statutes and regulations should be relevant to a claim of qualified immunity was "appealing", it had to choose between two evils involving the vindication of constitutional rights and the effective conduct of state official's duties. This Court recognized that state officials are subject to a "plethora of rules" often contradictory and ambiguous and that an official should not always err by being cautious as at times swift action is needed to effectively perform official duties. The approach that an official could be held liable for violation of a statute or regulation was not acceptable as it could subject officials to liability where the right was not clearly defined or even foreshadowed. Further, Davis pointed out that the issue of qualified immunity could then turn on the meaning or purpose of a statute which the district court might not be able

to address on summary judgment. The concerns of this Court in Davis are now the troubling realities in this case.

In this case, the court of appeals held that the Attorney General clearly exceeded his authority to establish a program to educate consumers by establishing a corporate state agency to perform this task under West Virginia Code 46A-7-102. App. 24-28. The court of appeals also rejected Attorney General McGraw's claim that his authority to perform these acts existed under the state constitution which directed him to "faithfully discharge the duties of his office to the best of his skill and judgment" and "perform such duties as prescribed by law", as set forth in Article IV, §5 and Article VII, §1 of the West Virginia Constitution and that his acts ignored applicable case law limiting the Attorney General's powers. App. 26-28. The panel opinion found that the Attorney General's power had been limited in Manchin v Browning, 296 S.E.2d 909 (W.Va. 1982) and other cases. Attorney General McGraw had authored the Manchin case as a justice on the state supreme court of appeals.

The court of appeals stated in footnote 5 of its concurring opinion that the fact that Attorney General McGraw had created an entity heretofore unknown in West Virginia, and used his own funds, showed that"...he wondered far beyond the limits of his authority." App. 26-28. The dissenting opinion on the petition for rehearing en banc found that this substitution of judgment that the acts clearly exceeded McGraw's powers was based on a distinction nowhere in any statute, regulation or court decision in West Virginia and was "...nothing but the rawest exercise of federal power." App. 111-113. In effect, the court of appeals interpreted the scope of petitioner's authority in a manner never before addressed by state law or court decision on this issue.

It must be pointed out that the district court addressed this scope of authority issue in a footnote. The court of appeals decided this case based on this issue. The dissenting opinion stated:

> "And, as if to add insult to injury, this new framework is created and imposed in a case in which the issue was not even presented, the district court having treated the issues only conclusiorily, See Better Government Bureau, Inc. v McGraw, 904 F.Supp. 540, 553 n.17 (S.D.W.Va. 1995). The panel thus addresses with a thirty page opinion an issue mentioned passingly by the district court in only a footnote, and consigns to a footnote the district court's principal holding that there existed a factual dispute as to whether McGraw acted with the requisite retaliatory motive to violate the plaintiff's clearly established First Amendment right..."
>
> App. 106.

The concerns expressed by these words are evident.

Interestingly, although the court of appeals declined to follow McElveen v County of Prince William, 725 F.2d 954 (4th Cir. 1984) which utilized subjective factors to analyze qualified immunity entitlement which case was decided after Harlow and has never been reversed, it has effectively left in place a denial of qualified immunity by the district court which found that a factual dispute existed as to whether Attorney General McGraw acted with a retaliatory motive. Such a determination on motivation undoubtedly would involve the consideration of subjective issues. Admittedly, even though an official's subjective intent may

be irrelevant to the immunity question under Harlow, it still may be an essential element of the alleged constitutional violation. However, if Attorney General McGraw's acts were lawful then his motivation is of no moment. In Elder v Holloway, 510 U.S. 516 (1994), this Court held that whether a federal right was clearly established so no qualified immunity exists is a question of law not legal facts. This determination makes this ruling even more confusing. The fact that the opinion of the court of appeals also addressed Attorney General McGraw's knowledge of the scope of the attorney general's authority as he had written opinions as a state supreme court justice seems to inject a subjective view into what the court claimed was an objective interpretation. App. 27-28. There may be some apparent merit to such analysis as to what a reasonably competent official as attorney general might understand about rights or duties since an attorney general is law trained, but even astute lawyers may disagree as to the meaning of intricate state laws.

As this Court stated in Harlow, supra, if the law was not clearly established, an official cannot be expected to anticipate future developments of the law "...nor could he fairly be said to 'know' that the law forbade conduct not previously identified as unlawful..." 457 U.S. at 818. This Court further pointed out that a reasonable official should know the law governing his or her acts but if an official could show extraordinary circumstances so that he or she neither knew or should have known the legal standard then qualified immunity could be sustained although the defense would turn "primarily on objective factors" 457 U.S. at 819. Although this Court in Anderson v Creighton, 483 U.S. 635 641 (1987) held that the officer's subjective beliefs about a warrantless search were irrelevant, it held that the question was whether a reasonable officer could believe the search was lawful in "...light of clearly established law and the information the searching officers possessed". A public

official cannot be required to predict a future court interpretation of some law.

> 2. The decision below misapplies the standards for the determination of qualified immunity cases established in the case of Harlow v Fitzgerald 457 U.S. 800 (1982) and Davis v Scherer, 468 U.S. 183 (1984).

The pivotal point of this case turns on the holding in Davis v Scherer, supra. This Court in Davis held that a state official does not lose qualified immunity even by violating a state regulation. This Court observed in Davis that the proposition that a clear state law violation by an official should cause the loss of immunity was appealing but such a view, if adopted, would disrupt the balance between the preservation of constitutional rights and the official's meaningful performance of duties. The district Court in Davis had taken the view that the violation of a clearly established state regulation was per se unreasonable. In the appellee's view, any official conduct that violated a state statute was not objectively reasonable as an official was obligated to follow the law. This Court held in Davis that officials do not forfeit immunity by violating a statute or regulation unless there is a clear violation of a statutory right that gives rise to the cause of action. If a statute or regulation does give rise to the cause of action, then immunity is waived only to a limited extent. There is no claim here that some state statute itself created a cause of action. Under Davis, the violation of a state statute or regulation, not the basis of the suit, does not deprive the official of qualified immunity.

The dissenting opinion addressed this issue as follows:

> "Rather than acquiesce in today's unsupported and insupportable reformulation of Harlow's qualified immunity inquiry, I would grant the petition for rehearing en banc and dispose of the appellee's argument, that a public official loses his entitlement to federal qualified immunity if he exceeds the scope of his state law authority, in precisely the same way the Supreme Court disposed of the doctrinally indistinguishable claim that federal qualified immunity is lost if an official violated clearly established state law. I would acknowledge that '[o]n its face...the claim is not without some force,' but I would 'decline to adopt it,' Davis, 468 U.S. 194, because of its fundamental incompatibility with established qualified immunity doctrine and because of the unfathomable consequences that its acceptance would (and now will) have for a framework carefully designed by the Supreme Court to result in the expeditious resolution of suits against public officials for the reasonable exercise of their discretionary judgments."
>
> App. A at 116.

The issue in Davis was a limited and discrete one. The question was whether qualified immunity was defeated where the defendant violated any clearly established law, even one under state law, or whether the clearly established right must be a federal right. This Court held the latter. See also Elder v Holloway, supra. The dissenting opinion on the petition for rehearing en banc observed that while state law may occasionally provide a ground for the right that gives

issue to a § 1983 claim, such as where state law created a property right, "...state law does not, and can never, provide the right that gives rise to the cause of action under § 1983" App. 107. The dissenting opinion further stated that whether a state official violated state law or acted outside the scope of the state law is never determinative of the immunity defense. *Id.* In Clark v Link, 855 F.2d 156, 161 (4th Cir. 1988), Judge Russell wrote that "A fundamental and fatal flaw on the decision of the district court ...is its assumption that a §1983 claim may be based alone on a violation of state law or a state tort."

The Clark case undertook a thorough review of this issue. It pointed out that in Street v Surdyka, 492 F.2d 368 (4th Cir. 1974), the court had held that even if the police officer had violated the state arrest law, he was not liable under § 1983 unless he also violated federal constitutional law regarding arrests. See also Fisher v Washington Metro Area Transit Authority, 610 F.2d 1133 (4th Cir. 1982). The Clark case also pointed out that Chief Justice Rehnquist had stated in a Florida case "...that mere errors of state law are not the concern of this Court...unless they arise for some reason to the level of a denial of rights protected by the United States Constitution" Barclay v Florida, 463 U.S. 939, 957-958 (1983). The Clark v Link case also cited Davis v Scherer, supra, to support this view that a violation of state law does not generally foreclose a qualified immunity defense. The panel opinion of the court of appeals did not address the holding in the Davis case.

Interestingly, the concurring opinion relied upon Wyatt v Cole, 504 U.S. 158 (1992), to support its position. In Wyatt, this Court held that private defendant could not claim qualified immunity for alleged violations of § 1983. The concurring opinion observed that the Wyatt case never mentioned Davis. The dissenting opinion points out that Wyatt was never mentioned in the original panel opinion and states "[]t would of course be difficult to imagine a case less

like the case before us than Wyatt" App. 113. The sharpness of these disagreements in both the concurring and dissenting opinions on the denial of the petition for rehearing as to the proper means of analyzing qualified immunity matters justifies a review here.

The court of appeals in its opinion held that its ruling does not require a state official to be responsible for knowledge of an arcane rule but all that the official must know is the limit of his or her authority. App. 18-20. The court of appeals stated that its ruling jeopardized no public policy goal by requiring a government official to know the limits of his authority and holding him or her responsible for actions clearly outside these limits. *Id.* The court of appeals stated in its concurring opinion that when a state official acts totally beyond his or her authority, they receive no immunity at common law nor under § 1983. App. 20. That opinion emphasized that at the common law, an official's immunity was limited to acts within the scope of his authority which it claims this Court had followed in a long line of cases. In fact, this Court in Butz v Economou, 438 U.S. 478 (1977), observed that earlier immunity cases had not abolished liability for federal officers who had acted manifestly beyond their line of duty or beyond their statutory limits or acted knowingly to violate rights. Section 1983 omits the immunities on its face but this Court has identified numerous immunities applicable in such cases. Tower v Glover, 467 U.S. 914 (1984).

The concurring opinion seems to rely on absolute immunity cases in making the conclusion that scope of authority was a relevant issue in a qualified immunity analysis. It also cited the recent case of Clinton v Jones, 117 S.Ct. 1636, 137 L. Ed.2d 945 (1997) for this proposition which case addressed absolute presidential immunity and barred it for unofficial conduct while noting that the sphere of the official action must be related to the immunity's purpose. We do not believe that the Clinton case extends so

far as the court of appeals has extended it. The dissenting opinion pointed out that although the concurring opinion for the first time placed reliance on Wyatt, the point was misplaced as to the common law analogy and pointed out that as to absolute immunity, common law historical practice should be followed but qualified immunity had diverged "to a substantial degree from the historical standards" Wyatt, 504 U.S. at 170. App.111-112. The concurring opinion makes a distinction between a claim to qualified immunity and an entitlement which may be defeated to distinguish Davis. App. 113-116. The dissent finds that distinction unexplained and nonexistent. *Id.*

Essentially, under this ruling a state official may forfeit his or her qualified immunity if they innocently or negligently misapprehend, misinterpret or misjudge their scope of authority under state law. Although a West Virginia case refers to scope of authority in addressing state tort claims for which qualified immunity was claimed, we do not believe such an analysis is appropriate for § 1983 claims although an analogy to such cases was drawn in that case. State v Chase Securities, 424 S.E.2d 591 (W.Va. 1992). It appears that the confusion as to the holding in Davis continued in that case as the court in footnote 17 noted that violations of administrative rules may be included as rights under Davis which seems to be plain wrong. West Virginia has extended discretionary immunity even to negligence claims involving state officers. Clark v Dunn, 465 S.E.2d 374 (W.Va. 1995).

Thus, a claim under § 1983 could be premised upon a negligent interpretation of the scope of authority under state law which would appear to violate the holding in Daniels v Williams, 474 U.S. 327 (1986). Effectively, the court of appeals' decision could place an official in a position where he or she may forfeit immunity if they cannot anticipate that a federal court would forbid their conduct which conduct had not been previously identified as beyond their authority. The

chilling effect of this guessing game is what Harlow meant to preclude. There should be no liability for a mistake in judgment whether law or fact. In Hunter v Bryant, 502 U.S. 224 (1991), this Court held that the information held by federal agents established a reasonable belief that probable cause for arrest existed and qualified immunity should be provided even if their belief was mistaken. This Court pointed out that the qualified immunity standard permits mistakes and reasonable errors. The central purpose of immunity is to protect officials from interference with their duties and the chilling threat of liability. The doctrine of qualified immunity is an immunity from suit rather than a defense to liability and it is lost if a case is erroneously tried. Mitchell v Forsythe, 472 U.S. 511 (1945).

The petitioner argued below, that if this approach was to be taken, whether an action was clearly established as beyond the scope of an official's authority should depend upon an examination of case law and where no contrary case law existed, then the state official must be held to have acted within the scope of their authority. The court of appeals found this argument in footnote 4 of its opinion to be faulty and observed that statutes and regulations must also be examined. That holding is erroneous even if this approach was reasonable.

In Francis v Coughlin, 891 F.2d 43 (2d Cir. 1989), the court set out three factors to determine if a right was clearly established including whether under pre-existing law an official would understand his or her acts were unlawful. In West Virginia a judge has immunity for acts within his jurisdiction but outside his authority. Carey v Dostert 406 S.E.2d 678 (W.Va. 1992). As the dissenting opinion pointed out, there was nowhere in any statute, regulation or court opinion support for the distinction relied upon by the court of appeals in finding the Attorney General clearly exceeded his authority App. 111. Effectively, under the approach in this case, a misjudgment by an official as to his scope of

authority would forfeit immunity. Such a result was not contemplated by Harlow or Davis.

In Horta v Sullivan, 4 F.3d 2 (1st Cir. 1993), the court held that the plaintiff must demonstrate that, at the time at issue, in light of the pre-existing law, the unlawfulness of the action would have been apparent to the official to challenge a qualified immunity claim. This view was followed by the 11th Circuit in Lassiter v Alabama A&M University Board of Trustees, 28 F.3d 1146 (11th Cir. 1994), which held that for the law to be clearly established it must have been developed in a concrete and defined manner to make it obvious to the official that what he was doing violated federal law. The plaintiff has to demonstrate that the law is clearly established which means that the "contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violated that right." Anderson v Creighton, 483 U.S. 675, 640. (1987). That rule has been exceeded by the approach of the court of appeals here.

The plain language of § 1983 supports causes of action based on violations, under color of state law, of federal statutory or constitutional rights as interpreted by this Court in Maine v Thiboutot, 448 U.S. 1 (1980). A state statute does not provide a federal cause of action for state law violations. Philadelphia Police and Fire Association for Handicapped Children Inc. v City of Philadelphia, 874 F.2d 156 (3d Cir. 1989). In view of this case law, it seems the court of appeals went too far in imposing a new framework for analysis of qualified immunity claims. Such an approach is not only not required under Harlow, supra but would create difficult if not intolerable burdens on state officials and the federal courts considering qualified immunity claims.

The court of appeals held that only if a state official acted plainly outside the perimeter of his duties under state law does he or she lose immunity. The court of appeals cites three circuit court cases to support this proposition, namely

Schechter v Comptroller of New York, 79 F.3d 264 (2d Cir. 1996); Lenz v Winburn, 51 F.3d 1540 (11th Cir. 1995) and Merritt v Mackey, 827 F.2d 1368 (9th Cir. 1987). These cases cannot be used to expand the factors used to analyze the application of qualified immunity. While it is true that the Eleventh Circuit uses a two step analysis for determination of qualified immunity issues, Harlow does not support that approach. The Lenz case involved a guardian ad litem who for compassionate reasons seemed to act in a private capacity rather than in an officer of the court capacity. That decision is distinguishable here.

The Schechter case seems to turn on the concept that no immunity exists for unofficial acts. The court there was concerned with an approach that tested the legality of the official act as the determining factor on the scope of authority question. The court recognized that to examine such an issue in that manner could effectively eliminate the qualified immunity defense as any wrongful conduct would be beyond the scope of authority. That was precisely the concern in Davis. In the Merritt case, state law had created a property interest in continued employment for an employee of a corporation receiving federal funding. Further, it was determined that the officials knew they had no authority to act and knowingly acted outside their authority. We believe these cases, even though distinguishable otherwise, still propound a two step approach to a qualified immunity analysis that defies Davis. We believe that Davis makes it clear that no circumstance other than the objective reasonableness of an official's act measured by reference to clearly established law should be considered in addressing the issue of qualified immunity.

The approach in Schechter, Lenz and Merritt which utilizes a two prong test which includes an analysis of scope of authority has apparently caused confusion and contradictory opinions in the courts of those circuits. In A.M. v Grant, 889 F. Supp. 1495 (M.D. Ala. 1995), the court

used a two prong analysis to address a qualified immunity claim which first required the public official to prove he was performing duties within his discretionary authority, which could involve facts showing acts were part of normal job duties or within authority give by his or her employer, and secondly that the constitutional law was clearly established and the government official's conduct presented a genuine issue of fact that they engaged in acts violative of clearly established law. In Pisello v Town of Brookhaven, 933 F. Supp. 202 (E.D. N.Y. 1996), the court held that qualified immunity existed if the conduct does not violate clearly established constitutional and statutory rights but even if the right is clearly established, an entitlement to qualified immunity may exist where it was objectively reasonable for the official to believe his acts did not violate the clearly established right.

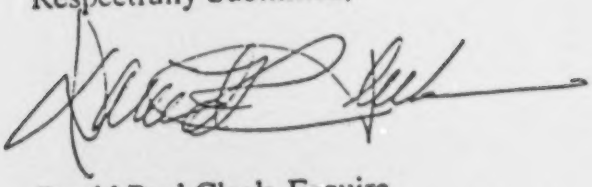
In Zappala v Albicelli, 954 F. Supp. 538 (N.D. N.Y. 1997), the district court held that the qualified immunity doctrine analysis required a two prong test. It stated that these two prongs were whether the right claimed to be violated was clearly established and whether the official's conduct was still objectively reasonable under the circumstances. The district court cited Schechter in this opinion and observed that the Second Circuit had suggested that the clearly established prong could be determined by examining three factors. Those factors were: (1) whether the right was defined with reasonable specificity so that the official would have truly been on notice of the relationship between his conduct and applicable law; (2) whether the law of this Court and the Second Circuit supported the existence of the right and; (3) whether the state of the law at the time of alleged violation would have given a reasonable official an understanding that his or her acts were unlawful. It should be noted that the court of appeals in the concurring opinion here asserted this scope of authority issue was a matter of first impression in this circuit.

The district court in Wise v The New York City Police Department, 928 F. Supp. 355 (S.D. N.Y. 1996), held that there was a three prong test for analyzing whether a right was clearly established and followed Schechter as had Zappala. The only question to be decided there was whether a reasonable official would have believed their acts were unlawful under pre-existing law. The district court quoting Malley v Briggs, 475 U.S. 335 (1986), stated that an official can comply with the objective reasonableness test if it is shown that "'officers of reasonable competence could disagree' on the legality of defendant's actions" 928 F. Supp. at 368. In this case, the court of appeals in the dissenting opinion observed that the panel decision substituted its judgment for the attorney general who had formerly served on the Supreme Court of Appeals in West Virginia. App. 111-112. It seems to depend on which side of the issue the drafter of the opinion stands as to whether that prior service is a detriment or a compliment. This case presents an opportunity to reconcile the immunity cases and to set forth a firm and unequivocal standard for the federal courts to use which effectively promotes the balancing of interests required to make the doctrine of qualified immunity an effective tool in the determination of § 1983 cases.

## CONCLUSION

For these various reasons, a petition for certiorari should issue to review the judgment and opinion of the Fourth Circuit Court of Appeals in this proceeding.

Respectfully Submitted,



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FILED

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No. _____

In The
# Supreme Court of the United States

October Term 1997

**DARRELL V. MCGRAW, JR., Attorney General,
State of West Virginia,
Personally and in His Official Capacity,**
*Petitioner,*

v.

**BETTER GOVERNMENT BUREAU,
INCORPORATED, an Ohio Corporation,**
*Respondent.*

**ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

## Appendix to Petition for Writ of Certiorari

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**PUBLISHED**
**UNITED STATES COURT OF APPEALS**
**FOR THE FOURTH CIRCUIT**

No. 96-1464

In Re: BARBARA H. ALLEN,

Appellant,

BETTER GOVERNMENT BUREAU, INCORPORATED,
an Ohio Corporation,

Plaintiff-Appellee,

v.

DARRELL V. MCGRAW, JR., Attorney General,
State of West Virginia, Personally and
in his Official Capacity;
BETTER GOVERNMENT BUREAU OFFICE
OF THE ATTORNEY GENERAL STATE OF
WEST VIRGINIA, A Body Politic,
A Corporate Instrumentality of Government with
Limited Agency and Quasi-Sovereign Capacity;
KEN HECHLER, Secretary of State,
in his Official Capacity,

Defendants,

v.

DONNA WILLIS,

Party in Interest.

No. 96-1601

BETTER GOVERNMENT BUREAU, INCORPORATED, an Ohio Corporation,

Plaintiff-Appellee,

v.

DARRELL V. MCGRAW, JR., Attorney General, State of West Virginia, Personally and in his Official Capacity,

Defendant-Appellant,

and

BETTER GOVERNMENT BUREAU OFFICE OF THE ATTORNEY GENERAL STATE OF WEST VIRGINIA, A Body Politic, A Corporate Instrumentality of Government with Limited Agency and Quasi-Sovereign Capacity; KEN HECHLER, Secretary of State, in his Official Capacity,

Defendants,

v.

BARBARA H. ALLEN; DONNA WILLIS,

Parties in Interest.

No. 96-1652

BETTER GOVERNMENT BUREAU, INCORPORATED, an Ohio Corporation,

Plaintiff-Appellee,

v.

DARRELL V. MCGRAW, JR., Attorney General,
State of West Virginia, Personally and
in his Official Capacity,

Defendant-Appellant,

and

BETTER GOVERNMENT BUREAU OFFICE
OF THE ATTORNEY GENERAL STATE OF
WEST VIRGINIA, A Body Politic,
A Corporate Instrumentality of Government with
Limited Agency and Quasi-Sovereign Capacity;
KEN HECHLER, Secretary of State, in his Official Capacity,

Defendants,

v.

BARBARA H. ALLEN; DONNA WILLIS,

Parties in Interest.

Appeals from the United States District Court
for the Southern District of West Virginia, at Charleston.
Charles H. Haden II, Chief District Judge.

(CA-94-952)

Argued: July 9, 1996
Decided: February 6, 1997
Entered: February 6, 1997

Before NIEMEYER, MICHAEL, and MOTZ, Circuit Judges.

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No. 96-1652 affirmed and No. 96-1464 and No. 96-1601 reversed and remanded by published opinion. Judge Motz wrote the majority opinion, in which Judge Michael concurred.

Judge Niemeyer wrote an opinion concurring in part and dissenting in part.

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## COUNSEL

**ARGUED:** David Paul Cleek, MCQUEEN, HARMON, POTTER & CLEEK, Charleston, West Virginia; James Anthony McKowen, ALLEN & ALLEN, L.C., Charleston, West Virginia, for Appellants. Roger Patrick Furey, ARTER & HADDEN, Washington, D.C., for Appellees. **ON BRIEF:** Marilyn T. McClure, CLEEK, PULLIN, KNOPF & FOWLER, Charleston, West Virginia, for Appellants. Michael B. Adlin, ARTER & HADDEN, Washington, D.C.; E. Joseph Buffa, Charleston, West Virginia, for Appellees.

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## OPINION

DIANA GRIBBON MOTZ, Circuit Judge:

Against a background of drama and intrigue, the Attorney General of West Virginia claims qualified immunity and his outside counsel asserts, on the Attorney General's behalf, attorney-client privilege. We affirm the district court's refusal to grant qualified immunity to the Attorney General, because he engaged in activity a reasonable official in his position would have known was clearly established to be beyond the scope of his authority. However, because the Attorney General's outside counsel properly relied on the opinion work product doctrine and, at her client's behest, the attorney-client privilege, in refusing to answer certain deposition questions and produce certain documents, we reverse the district court's order finding outside counsel in contempt.

I.

A.

The first major question raised in these consolidated cases, the qualified immunity question, revolves around a non-profit organization known as the Better Government Bureau, Inc. (BGB) and its efforts to incorporate under that name in the State of West Virginia.

BGB has been incorporated in the State of Ohio since August 1993, and in the State of Washington since early 1994. A government "watchdog" association, BGB's members include approximately forty-seven businesses and 304 individuals from various states. In addition, BGB works with various advocacy groups, including the Heritage Foundation, the National Vietnam Veteran's Coalition, and the Christian Coalition. BGB's mission is "to make government more efficient, responsive and less corrupt" by working for lower taxes, fewer restrictions on free enterprise, and less bureaucracy. BGB monitors and investigates government activities, and disseminates information about government policies affecting businesses, focussing particularly on complaints from its members.

In August 1994, Suarez Corporation Industries (SCI) lodged a complaint with BGB regarding West Virginia Attorney General Darrell McGraw and his Office. SCI is one of BGB's most active members and its largest source of membership dues. The Attorney General's Office had filed suit against one of SCI's subsidiaries for fraudulent activities and violations of West Virginia's Consumer Credit and Protection Act, W. Va. Code §§ 46A-1-101 to 46A-8-102. SCI asserted that the investigation and prosecution of these violations were improper and raised questions about abuse of power. BGB attempted to investigate this complaint by requesting information from the Attorney General under the West Virginia Freedom of Information Act, W. Va. Code §§

29B-1-1 to 29B-1-7. The Attorney General assertedly refused to provide the requested information.

In the face of what it considered stonewalling, BGB decided to go public with its dispute with the Attorney General. BGB broadcast the following announcement on three area radio stations on September 8, 1994:

> THIS IS AN IMPORTANT ANNOUNCEMENT
>
> The Better Government Bureau is investigating the actions of Attorney's [sic] General Darrell McGraw and [Assistant Attorney General] Tom Rodd.
>
> Voters already removed McGraw from the State Supreme Court because of his poor performance.
>
> Now we are trying to obtain public information about the Attorney General under the "Freedom of Information Act", but it has been denied. What are McGraw and Rodd trying to hide?
>
> If you have any information about Darrell McGraw, Tom Rodd or anyone in the Attorney General's office, please contact the Better Government Bureau toll free at 1-800-807-9881. The number again is 1-800-807-9881.
>
> PAID FOR BY THE BETTER GOVERNMENT BUREAU.

Subsequently, an article about BGB appeared in the Charleston Gazette. The article paraphrased a BGB

newsletter's criticism of McGraw and Rodd, and indicated that BGB intended to "open a West Virginia office and possibly start a West Virginia chapter." The newspaper quotes BGB's president, Kenneth Nickalo, as saying "[w]e're sick of the state government of West Virginia . . . . We think we can crack politics in West Virginia, use what we do in West Virginia as a model, and do what we'll do in West Virginia in other states."

A week after this article appeared in the Charleston Gazette, Attorney General McGraw instructed an employee, Lila Hill, to reserve the corporate name, "Better Government Bureau," with the West Virginia Secretary of State's Office pursuant to W. Va. Code § 31-1-12 (allowing reservation of the "exclusive right to the use of a corporatename"). When Hill attempted to reserve the name "Better Government Bureau," she was informed that anyone seeking to reserve that name had to see Mr. Wilkes, the Director of the Corporations Division of the Secretary of State's Office. Wilkes, who had placed an "administrative flag" on the name because Secretary of State Ken Hechler "had an interest in" it, was unavailable. Hill returned to the Attorney General's office and informed McGraw that she had been unable to see Wilkes or to reserve the name. McGraw instructed Hill to return to the Secretary of State's Office and to see Secretary of State Hechler personally about reserving the Better Government Bureau name.

Hill returned and met with Secretary of State Hechler, who personally escorted her back to the Corporations Division; Hill then reserved the name "Better Government Bureau." Later that same day, Hill and McGraw completed the necessary forms, and Hill went to the office of the County Clerk to file articles of incorporation for a new corporation with the name, "Better Government Bureau, State of West Virginia, a Government Agency Corporation." McGraw used personal funds to pay for the incorporation fee.

About a month later, BGB followed through on its plans to open a West Virginia chapter and applied for certification as a foreign corporation doing business in West

Virginia. The Secretary of State's Office rejected BGB's application, however, because another entity (the Attorney General's) had already incorporated in West Virginia using "Better Government Bureau" as part of its name.

Nickalo, BGB's president, sent letters to both McGraw and Hechler requesting that they take appropriate steps to eliminate the obstacles to BGB's incorporation. Although McGraw did amend his corporation's articles of incorporation to modify its name slightly, he did not remove the words "Better Government Bureau" from the name.[1] Thus BGB remained unable to incorporate or register to do business as a foreign corporation in West Virginia under its chosen name.

At the same time BGB was attempting to incorporate in West Virginia, Attorney General McGraw wrote to other state attorneys general about BGB. On October 4, 1994, he sent a letter to the attorneys general of all forty-nine other states, in which he advised them:

> If your office becomes involved in a sweepstakes probe, you will encounter this corporation. To foreclose the possibility of such a corporation operating in your State, you may want to register the name of the Better Government Bureau as an agent for the Attorney General's Office with the Secretary of State's Office or take other preventative measures.

Two days later, McGraw sent another letter to the same recipients, this time by facsimile. This letter alleged that an

---

[1] The entity's name has undergone several changes. The current name is "Better Government Bureau Office of the Attorney General State of West Virginia a body politic a corporate instrumentality of government with limited agency and quasi-sovereign capacity."

SCI attorney had "threatened violence" upon Deputy Attorney General Rodd, and advised:

> When you come up against these people, you should know that there is a possibility that their modus operandi might include a proclivity to violence.
>
> Please recall my recent letter, in which I recommend that you protect the name Better Government Bureau in your State, otherwise when you act to protect your consumers you will be attacked by a Better Government Bureau for doing so.

On October 28, 1994, BGB filed suit in federal court against Attorney General McGraw, personally and in his official capacity, the "government agency" BGB, and Secretary of State Hechler, in his official capacity. BGB alleged: (1) McGraw and Hechler violated BGB's rights of free speech under the federal and state constitutions; and (2) all of the defendants infringed on BGB's trade name and service mark in violation of the Lanham Act, 15 U.S.C. § 1125(a), and the common law. BGB sought injunctive relief, money damages, and attorneys fees; although, on the constitutional claims brought pursuant to 42 U.S.C. § 1983, BGB sought money damages only against McGraw.

Following discovery, the parties filed cross motions for summary judgment. On September 16, 1995, the district court issued a thorough opinion addressing those motions. See Better Gov't Bureau v. McGraw, 904 F. Supp. 540 (S.D.W. Va. 1995). The court granted summary judgment to Hechler, the government agency BGB, and McGraw, in his official capacity, on their Eleventh Amendment immunity defenses to BGB's "state law causes of action." Id. at 553. The court denied all other motions for summary judgment, including that

based on McGraw's defense of qualified immunity to BGB's federal constitutional claims against McGraw in his personal capacity. Id. at 549-54. McGraw appealed the qualified immunity ruling; BGB did not cross appeal.

In December 1995, while the qualified immunity appeal was pending, BGB became aware of the existence of a highly relevant memorandum that the defendants had failed to identify or produce during discovery. BGB had received this memorandum from Donna Willis, a secretary in the Attorney General's Office, who McGraw subsequently fired. The memorandum was written by Daynus Jividen, a top McGraw aide, to Secretary of State Hechler.

The memorandum, dated September 26, 1994, reads as follows:

> The Attorney General's Office anticipates that an organization called the Better Government Bureau, out of Canton, Ohio, will shortly seek registration through your office, in order to conduct its alleged business in the State of West Virginia. When the Better Government Bureau attempts registration the Attorney General requests your office to resist and refuse such registration on the grounds that the Better Government Bureau's attempt to ply its business in our state constitutes a fraud and a deceit.
>
> Also, please inform me when the organization's application is received by your office. Thank you for your attention to this matter.

The Jividen memorandum, written on McGraw's letterhead, indicates that copies were sent to McGraw and Assistant Attorney General Francis Hughes.

On December 29, 1995, BGB's attorneys informed McGraw's counsel that BGB had obtained a copy of the Jividen memorandum. McGraw's attorneys then produced to BGB's attorneys Secretary of State Hechler's reply to the Jividen memorandum, which reads:

> In response to your memorandum of September 26, and after personal discussion with the Attorney General, I will be pleased to inform you when the Better Government Bureau actually attempts to register with the Secretary of State's office. The issue of resisting and refusing such registration is more complicated tha[n] I at first imagined.
>
> I do not recall any instance when any organization has been denied registration because of its political activity. You[r] memorandum refers to the BGB's "attempt to ply its business in our state [as] constitut[ing] a fraud and a deceit." Without passing judgment as to whether this would constiute sufficient grounds for resisting and refusing registration, I would ask that you spell out in writing the fraud and deceit to which you refer in your September 26 memorandum.

Hechler never received any support for the Jividen memorandum's allegations of fraud and deceit.

On January 5, 1996, in response to Donna Willis' leak of the Jividen memorandum to BGB, the Attorney General retained outside counsel, Barbara H. Allen, Esquire. Allen was engaged to investigate possible document mismanagement and confidentiality breaches in the Attorney General's Office and to prepare a written report of her findings and recommendations.

A few days later, BGB requested that the district court reopen discovery to determine the circumstances surrounding the Jividen memorandum, the Hechler reply, and their nonproduction. On January 10, 1996, the district court granted BGB's motion, provided this court agreed to remand the case for further discovery. After we granted the parties' stipulated motion to remand, the district court vacated its October 1995 order denying McGraw summary judgment on qualified immunity grounds, and reopened discovery on that issue.

During the next few weeks, BGB deposed McGraw, Jividen, Hechler, and others. As is more fully discussed in section II.A., BGB also attempted to depose outside counsel Allen as to the results of her investigation. Although ordered to do so by the district court, Allen relied on the opinion work product doctrine, and, on her client's behalf, asserted attorney-client privilege and refused to answer certain questions or disclose certain documents. On April 25, 1996, the district court ultimately found her in contempt.

That same day, the district court issued a supplemental memorandum opinion with regard to McGraw's qualified immunity defense, reinstating its October 1995 order denying McGraw qualified immunity. McGraw appealed and we consolidated his appeal with the appeals from the contempt order.

B.

Attorney General McGraw seeks refuge in the well-established doctrine of qualified immunity: "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

The district court rejected McGraw's claim to qualified immunity, reasoning that McGraw's actions in creating his

own "governmental agency," Better Government Bureau corporation, "were beyond the permissible realm of his discretionary duties and thus outside the scope of his responsibility." Better Gov't, 904 F. Supp. at 553 n. 17. For this reason, the court held McGraw was "not entitled to qualified immunity." Id.[2] The Eleventh, Second, and Ninth Circuits, as well as the Western District of Virginia, have similarly held that an official acting beyond the scope of his authority may not claim qualified immunity. Shechter v. Comptroller of New York, 79 F.3d 265, 268-70 (2d Cir. 1996); Lenz v. Winburn, 51 F.3d 1540, 1545-47 (11th Cir. 1995); Merritt v. Mackey, 827 F.2d 1368, 1373 (9th Cir. 1987); Front Royal and Warren County Indus. Park Corp. v. Town of Front Royal, 922 F. Supp. 1131, 1142 (W.D. Va. 1996). However, this question is one of first impression in this court.

The Supreme Court has discussed the proper standard to apply when analyzing § 1983 immunity questions:

> Section 1983 "creates a species of tort liability that on its face admits of no immunities." Imbler v. Pachtman, 424 U.S. 409, 417 (1976). Nonetheless, we have accorded certain government officials either absolute or qualified immunity from suit if the "tradition of immunity was so firmly rooted in the common law and was supported by such strong policy reasons that `Congress would have specifically so provided had it wished to abolish the

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[2] The court also concluded that BGB alleged a violation of clearly established First Amendment rights, and that a reasonable person in McGraw's position would have known that his alleged conduct violated these rights. Better Gov't, 904 F. Supp. at 552-53. In view of our conclusion that McGraw exceeded the scope of his authority, we need not address this issue.

> doctrine.'" Owen v. City of Independence, 445 U.S. 622, 637 (1980) (quoting Pierson v. Ray, 386 U.S. 547, 555 (1967)). If parties seeking immunity were shielded from tort liability when Congress enacted the Civil Rights Act of 1871 - § 1 of which is codified at 42 U.S.C. § 1983 - we infer from legislative silence that Congress did not intend to abrogate such immunities when it imposed liability for actions taken under color of state law. See Tower v. Glover, 467 U.S. 914, 920 (1984); Imbler, supra, 424 U.S., at 421; Pulliam v. Allen, 466 U.S. 522, 529 (1984). Additionally, irrespective of the common law support, we will not recognize an immunity available at common law if § 1983's history or purpose counsel against applying it in § 1983 actions. Tower, supra, 467 U.S., at 920. See also Imbler, supra 424 U.S., at 424-29.

Wyatt v. Cole, 504 U.S. 158, 163-4 (1992) (parallel citations omitted). See also Malley v. Briggs, 475 U.S. 335, 339-40 (1986) ("Our initial inquiry [regarding immunity under § 1983] is whether an official claiming immunity under § 1983 can point to a common-law counterpart to the privilege he asserts. If an official was accorded immunity from tort actions at common law when the Civil Rights Act was enacted in 1871, the Court next considers whether § 1983's history or purposes nonetheless counsel against recognizing the same immunity in § 1983 actions.") (citations and internal quotation marks omitted); Heck v. Humphrey, 114 S. Ct. 2364, 2375-76 n.1 (1994) (Souter, J., concurring).

Therefore, we begin by examining the common law in 1871, when Congress enacted § 1983. This examination demonstrates that government officials at that time had no immunity for acts that were outside of the scope of their

authority. For example, Blackstone's codification of the common law refers to the use of legal authority as a defense to an action in trespass: a defendant could argue that a trespass was justifiable "if [the] man comes thither . . . to execute in a legal manner the process of the law." 3 William Blackstone, Commentaries *212. But in cases where a person entering land for a legal purpose "makes ill use of the authority with which the law entrusts him, he shall be accounted a trespasser ab initio." Id. at *213. Indeed, actions for malicious prosecution and false imprisonment allowed suit against government officials who exceeded their governmental authority. See id. at *126-38. See also Payton v. New York, 445 U.S. 573, 592 (1980) ("At common law, the question whether an arrest was authorized typically arose in civil damages actions for trespass or false arrest, in which a constable's authority to make the arrest was a defense. Additionally, if an officer was killed while attempting to effect an arrest, the question whether the person resisting the arrest was guilty of manslaughter or murder often turned on whether the officer was acting within the bounds of his authority." (emphasis added) (citations omitted)).

As the Supreme Court has noted, however, "it is the American rather than the English common-law tradition that is relevant." Anderson v. Creighton, 483 U.S. 635, 644 n.5 (1987). An investigation of American common law at the time of the enactment of § 1983 establishes that in this country the Supreme Court followed British common law in holding government officials liable for acts outside of their authority.

For example, in Mitchell v. Harmony, 13 How. 115, 54 U.S. 126 (1851), the Court drew a bright line between acts that were authorized by law, and those that were not: if a government officer seized property lawfully "the government is bound to make full compensation to the owner; but the officer is not a trespasser." 13 How. at 134, 54 U.S. at 146. So long as the officer acted "honestly, and to the best of his judgment, the law will protect him." Id. If, however, the

government officer acted beyond his authority, even "in his zeal for the honor and interest of his country . . . [he] has trespassed on private rights." 13 How. at 135; 54 U.S. at 147. See also Little v. Barreme, 2 Cranch 170, 179, 6 U.S. 170, 178 (1804) (commander of American warship liable for seizure of Danish cargo ship on high seas because captain acted beyond scope of congressional grant of authority); Wise v. Withers, 7 U.S. (3 Cranch) 331, 337 (1806) (collector of militia fines commits trespass by attempting to collect fine from person exempt from military service); Bates v. Clark, 95 U.S. 204, 209 (1877) (rejecting argument that defendants, as government officials, should not be liable because the "objection fatal to all this class of defences is that in that locality [the defendant officials] were utterly without any authority in the premises . . . . There was here no process from a competent court, nor any order from any source having authority, and there is, therefore, no defence.").

In short, in 1871 when Congress enacted § 1983, it was well recognized at common law that a government official who exceeded his authority enjoyed no immunity, but rather was civilly liable for money damages. Indeed, after carefully reviewing common law precedent, the Supreme Court reached precisely this conclusion in Butz v. Economou, 438 U.S. 478, 489-90 (1978). Following a discussion of Little, 6 U.S. (2 Cranch) 170, and Bates, 95 U.S. 204, the Court observed that "[a]s these cases demonstrate, [at common law] a federal official was protected for action tortious under state law only if his acts were authorized by controlling federal law. `To make out his defence he must show that his authority was sufficient in law to protect him.'" Butz, 438 U.S. at 490 (quoting Cunningham v. Macon & Brunswick R. Co., 109 U.S. 446, 452 (1883), and Belknap v. Schild, 161 U.S. 10, 19 (1896)).

Of course, we do not suggest that "the contours of official immunity . . . should be slavishly derived from" rules of the common law. Anderson, 483 U.S. at 645. Once a court has established the state of the common law at the time

Congress enacted § 1983, it must examine the history and purpose of § 1983 and "the special policy concerns involved in suing government officials." Wyatt, 504 U.S. at 164, 167 (citing Harlow, 457 U.S. at 813; Mitchell v. Forsyth, 472 U.S. 511, 526 (1985)).

We turn first to the history and purpose of § 1983. Nothing in either suggests that Congress intended government officials acting clearly beyond the scope of their authority to be immune from suits for money damages. The Supreme Court originally established absolute and qualified immunity under § 1983 because "[t]he legislative record gives no clear indication that Congress meant to abolish wholesale all common-law immunities." Pierson v. Ray, 386 U.S. 547, 554 (1967); see also Tenney v. Bandhove, 341 U.S. 367, 376 (1951) (legislative immunity). The legislative record similarly gives no indication that Congress meant to enlarge common law immunities to include officials acting outside the scope of their authority.

Next, we consider "the special policy concerns involved in suingpublic officials." Wyatt, 504 U.S. at 167. McGraw argues that because of these policy concerns, an official should only be held to be acting beyond the limits of his authority when he commits acts "clearly established" to be beyond the scope of that authority. Although our sister circuits have not (at least to date) so held, we agree that government officials should be provided this additional protection. In Harlow v. Fitzgerald the Supreme Court held that even when government officials act illegally, they will not be held liable for civil damages if their conduct is objectively reasonable, i.e., if it "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." 457 U.S. 800, 818 (1982). The Harlow standard was created "lest[the] threat of liability `dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties.'" Reynoldsville Casket Co. v. Hyde, ___ U.S. ___, ___, 115 S.Ct. 1745, 1751

(1995) (interior quotation marks omitted) (quoting Harlow, 457 U.S. at 814).

This policy concern is equally important when considering when an official is to be held to have committed acts outside of the scope of his authority. We certainly do not want public officials to shrink from fulfilling all of the duties even arguably within the scope of their authority out of fear that an incorrect interpretation of their duties would bar them from claiming qualified immunity. Holding an official not entitled to claim qualified immunity for acts clearly established to be beyond the official's authority offers public officials ample latitude to perform all of their duties. This rule is not so broad, however, that even those who are "plainly incompetent" or "knowingly violate the law" will nonetheless be allowed to claim qualified immunity. Malley v. Briggs, 475 U.S. 335, 341 (1986). This accords with Harlow's warning that the policy considerations that led to expanding qualified immunity should not be used to provide a "license to lawless conduct." Harlow, 457 U.S. at 819.

Thus, we hold that the policies that underlie Harlow similarly suggest that an official may claim qualified immunity as long as his actions are not clearly established to be beyond the boundaries of his discretionary authority.[3] This test is objective, and examines what a reasonable official in the defendant's position would have understoodthe limits of his statutory authority to be.

We also recognize that as a policy matter it will not always be fair to deny a defendant qualified immunity because government officials could not claim immunity for such behavior at common law. See Anderson, 483 U.S. at 646. To conclude that an official is not entitled to claim qualified immunity for acts clearly established to be beyond the scope of his authority, however, does not make the official responsible

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[3] Of course an official may still be liable for acts within his authority that violate clearly established law. Harlow, 457 U.S. at 818.

for knowledge of an arcane rule of nineteenth century law. Rather, all the official must know is the limit of his own authority. A government official does not need an extensive background in legal history to understand that he cannot claim qualified immunity when he acts totally beyond the scope of his authority. Thus, we jeopardize no public policy goal by requiring a government official to know the outer limits of his own authority and, in turn, holding him responsible for actions clearly established to be outside those limits.

We hold, therefore, that an official who performs an act clearly established to be beyond the scope of his discretionary authority is not entitled to claim qualified immunity under § 1983. Multiple other statements of the Supreme Court support this conclusion. For example, in one of the first § 1983 qualified immunity cases, the Court relied on Justice Harlan's explanation that it is "the relation of the act complained of to matters committed by law to [the official's] control or supervision - which must provide the guide in delineating the scope of the rule which clothes the official acts of the executive officer with immunity. . . ." Scheuer v. Rhodes, 416 U.S. 232, 247 (1974) (quoting Barr v. Matteo, 360 U.S. 564, 573-74 (1959) (plurality opinion) (internal citations omitted)). This understanding of § 1983 qualified immunity has been manifest in subsequent cases. See, e.g., Procunier v. Navarette, 434 U.S. 555, 561-62 (1978) (holding § 1983 immunity dependent upon "the scope of discretion and responsibilities of the office"); Wood v. Strickland, 420 U.S. 308, 318 (1975) (same). Similarly, the Court in Barr quoted Judge Learned Hand's famous statement that "[t]he decisions have, indeed, always imposed as a limitation upon the immunity that the official's act must have been within the scope of his powers. . . ." 360 U.S. at 572 (quoting Gregoire v. Biddle, 177 F.2d 579, 581 (1949), cert. denied, 339 U.S. 949 (1950)).

Our holding also accords with Fourth Circuit precedent, which has consistently limited entitlement to

qualified immunity to "[g]overnment officials who perform discretionary functions." Bonner v. Anderson, 81 F.3d 472, 475 (4th Cir. 1996) (emphasis added); see also Buonocore v. Harris, 65 F.3d 347, 353 (4th Cir. 1995) ("[O]fficials . . . [are] accorded qualified immunity . . . in the performance of discretionary duties."); Price v. Sasser, 65 F.3d 342, 345 (4th Cir. 1995) ("government officials performing discretionary functions generally are shielded") (quoting Harlow, 457 U.S. at 818); Slattery v. Rizzo, 939 F.2d 213, 216 (4th Cir. 1991) (Powell, J.) ("[g]overnment officials performing discretionary functions are shielded from civil liability"); Bright v. McClure, 865 F.2d 623, 625 (4th Cir. 1989) ("[P]ublic officials . . . are clothed with qualified immunity in the performance of discretionary functions.").

We emphasize that public officials seldom use their offices to engage in conduct that is entirely beyond their discretionary authority. In fact, plaintiffs rarely assert that the defendant officials were not "acting pursuant to their job functions and within the scope of their authority." See Jordan v. Doe, 38 F.3d 1559, 1566 (11th Cir. 1994). This is because most § 1983 claims involve conduct that relates to, or flows from, conduct that the official is indeed authorized to commit. However, when a government official does act totally beyond the scope of his authority, he received no immunity at common law and is entitled to none under § 1983.

C.

We now turn to establishing a framework for discerning when a government official may not claim qualified immunity because he has exceeded his authority.

Before permitting an official to claim qualified immunity a court must determine that the official's acts were not clearly established to be beyond the scope of his authority. The defendant official bears the burden of demonstrating that the conduct of which the plaintiff complains "falls within the

scope of the defendant's duties." Shechter v. Comptroller of New York, 79 F.3d 265, 268 (2d Cir. 1996); Rich v. Dollar, 841 F.2d 1558, 1563 (11th Cir. 1988) (holding that for immunity an official "must first prove that `he was acting within the scope of his discretionary authority when the allegedly wrongful acts occurred.'") (quoting Zeigler v. Jackson, 716 F.2d 847, 849 (11th Cir. 1983)); see also Mackey v. Dyke, 29 F.3d 1086, 1095 (6th Cir. 1994) (finding that "defendants bear the initial burden. . . [of] show[ing] they were acting within their discretionary authority at the time in question"); Gray v. Bell, 712 F.2d 490, 502 n.36 (D.C. Cir. 1983) ("It is clear that the scope of authority requirement is a prerequisite to any application of official immunity whatever the level of protection asserted or the nature of the claim involved."); Barker v. Norman, 651 F.2d 1107, 1124-25 (5th Cir. 1981) (to claim qualified immunity, a defendant official must show that "the complained-of actions were undertaken pursuant to the performance of his duties and within the scope of his discretionary authority"). But, in order to ensure that public officials are adequately protected from liability, an official's conduct falls within his authority unless a reasonable official in the defendant's position would have known that the conduct was clearly established to be beyond the scope of that authority.

In determining the scope of an official's authority, and whether the act complained of was clearly established to be beyond that authority, the issue is neither whether the official properly exercised his discretionary duties, nor whether he violated the law. If these were the relevant inquiries, any illegal action would, by definition, fall outside the scope of an official's authority. See Shechter, 79 F.3d at 269. To equate "the question of whether the defendants acted lawfully with the question of whether they acted within the scope of their discretion" is "untenable." Sims v. Metropolitan Dade Co., 972 F.2d 1230, 1236 (11th Cir. 1992); Barr, 360 U.S. at 572 ("A moment's reflection shows [that such an approach] defeat[s]

the whole doctrine.") (quoting Gregoire, 177 F.2d at 581). Instead, a court must ask whether the act complained of, if done for a proper purpose, would be within, or reasonably related to, the outer perimeter of an official's discretionary duties. Id. The scope of immunity "should be determined by the relation of the [injury] complained of to the duties entrusted to the officer." Doe v. McMillan, 412 U.S. 306, 319-20 (1973) (citing Barr, 360 U.S. at 573-74). An official acts beyond the scope of his authority only if the injury occurred during the performance of an act clearly established to be outside of the limits of that authority.

As an example of a court that properly focused upon the scope of the defendant's duties, consider Sims v. Metropolitan Dade County, 972 F.2d 1230 (11th Cir. 1992). In Sims, an employee alleged that his supervisors in the Dade County Department of Community Affairs unconstitutionally suspended him from work for three days solely because he had made inflammatory public statements. To determine whether the supervisors acted within the scope of their authority the Eleventh Circuit inquired whether suspending an employee was within the scope of the supervisors' discretionary duties, not, as the plaintiff employee urged, whether suspending an employee for exercising First Amendment rights was within the scope of those supervisory duties. Id. at 1236. The Sims court held that "[a]s supervisory employees of the Department, the [d]efendants' duties included the consideration of complaints about the conduct of Department employees, such as [plaintiff], and the administration of discipline" and for this reason, the "[d]efendants successfully established that they acted within the scope of their discretionary authority." Id.

Similarly, the proper inquiry in the instant case is whether McGraw's action -- forming his own "government agency" corporation under the auspices of the Attorney General's Office -- was clearly established to be beyond the scope of his authority. The issue is not whether McGraw

exceeded the scope of his authority by forming this corporation in retaliation for speech critical of him.

In Doe and Barr the Supreme Court made clear that determination of the scope of an official's authority depends upon an analysis of the statutes or regulations controlling the official's duties. See Doe, 412 U.S. at 321-24 (carefully interpreting statutes dictating the duties of the Public Printer and Superintendent of Documents); Barr, 360 U.S. at 574-75 (analyzing duties of agency director under statute defining authority of agency). See also Lenz, 51 F.3d at 1546-47 (relying on both Florida statute that enumerates the duties of a guardian ad litem and training manual for Florida guardian ad litem program); Krohn v. United States, 742 F.2d 24, 30 (1st Cir. 1984) (examining statutes that govern FBI duties).[4]

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[4] McGraw argues that whether an action is clearly established to be beyond the scope of a public official's authority must, like a Harlow inquiry, be divined primarily from case law, and in the absence of specific case law to the contrary, an official must be held to have acted within the scope of his authority. There are several problems with this argument. First, McGraw's description of the Harlow inquiry is not wholly accurate; "there is no requirement that the exact right allegedly violated be previously specifically recognized by a court in order for it [to] be held clearly established for qualified immunity purposes." Buonocore v. Harris, 65 F.3d 347, 356-57 (4th Cir. 1995) (interior quotation marks omitted). Second, although McGraw is correct that case law is frequently crucial to a Harlow inquiry, this is because Harlow focuses on the reach of clearly established statutory or constitutional rights, which often are only illuminated by case law. In contrast, the scope of a defendant official's authority will most frequently be governed by statutes and regulations. Accordingly, whether an official's act was clearly established to be beyond the scope of his authority depends upon a review of the laws or regulations that governed his position at the time of the act. Any relevant case law, of course, should also be considered and accorded due weight. But, to require case law for this inquiry would grant many officials immunity for actions well beyond their statutory authority and rely on the faulty assumption that the limit of a government official's authority is generally defined by case law, rather than statutes or regulations.

We turn, therefore, to an analysis of West Virginia law to determine whether a reasonable official in McGraw's position would have understood that establishing a "government agency corporation" was an act clearly established to be beyond the limits of his authority. West Virginia law narrowly circumscribes the powers of the Attorney General. Indeed, McGraw himself so held in an opinion he authored as a justice of the Supreme Court of Appeals of West Virginia. See Manchin v. Browning, 296 S.E.2d 909, 914-17 (W. Va. 1982). Manchin held that under West Virginia law "the powers and duties of the Attorney General" are limited to those "specified by the constitution and by rules of law prescribed pursuant thereto." Manchin, 296 S.E. at 915. See also State ex rel. McGraw v. Scott Runyan Pontiac Buick, Inc., 461 S.E.2d 516, 523 (W. Va. 1995) ("[T]he Attorney General's powers are limited to those specifically conferred by statute."). The Manchin court extensively reviewed the authority historically granted the West Virginia Attorney General, and held that the Attorney General does not enjoy broad common law powers. Manchin, 296 S.E.2d at 915, overruling State v. Ehrlick, 64 S.E. 935 (W. Va. 1909).

Therefore, governed by McGraw's own holding for West Virginia's highest court, we must consider whether establishing a corporation is one of the duties "specified by the Constitution and by rules of law" for the Attorney General. Id. at 915. The Constitution of West Virginia simply provides that the Attorney General "shall perform such duties as may be prescribed by law." W. Va. Const., art. 7, § 1 (1996). No West Virginia law expressly grants the Attorney General the right to establish a corporation, let alone a "government agency" corporation under the auspices of the Attorney General's office, and no West Virginia Attorney General has ever done so. McGraw concedes this.

What McGraw argues, however, is that W. Va. Code § 46A-7-102(1) implicitly provides this authorization, by

permitting the Attorney General to "[r]eceive and act on complaints . . . [and] [e]stablish programs for the education of consumers." The crucial flaw in McGraw's argument is that forming a corporation is not establishing a "program," and the West Virginia legislature is well aware of the difference.

The West Virginia legislature has granted certain select government entities the power to create public corporations. See W. Va. Code § 5-26-4(13) (granting Governor's Cabinet on Children and Families power to "charter public and quasi-public corporations"); § 17-16B-11(b) (Public Port Authorities "authorized to create a quasi-public corporation"). In addition, the legislature has occasionally granted municipalities and counties the authority to charter public corporations. See W. Va. Code § 10-2-4a (granting municipalities power to create public corporation to act as park and recreation board); § 7-15-4 (granting counties power to create public corporations to provide ambulance services); § 7-17-9 (granting power to counties to create fire board as public corporation).

The power to create a public corporation, however, is clearly distinct from the power to establish a "program." Although the legislature has sparingly provided the authority to create public corporations, far more frequently it has permitted a state official or agency to establish a program. See, e.g., W. Va. Code § 5A-8-5 (state records administrator "shall establish and maintain a program for the selection and preservation of essential state records"); § 3-2-8(b)(2) (clerk of county commission shall establish program of voter registration); § 7-1-3aa (county commission "authorized and empowered to create a hazardous material accident response program"); § 7-4-6(d)(2) (West Virginia Prosecuting Attorneys Institute's duties include duty "to establish and implement general and specialized training programs"); § 7-7-2 ("attorney general is . . . authorized . . . to establish such inservice training programs [for prosecutors]"); § 7-148-9 (civil service commission shall "establish or prescribe a training program for

correctional officers"); § 15-2-41 (commission has power and duty to "[d]evelop and maintain a comprehensive program to prevent drunk driving"); § 16-22-2 (state bureau of public health "authorized to establish and carry out a program designed to combat mental retardation. . . due to phenylketonuria, galactosemia, hypothyroidism, and certain other diseases"); § 16-24-2 ("state director of health shall establish and maintain a state hemophilia program"); § 18-2-11 ("state board [of education] shall . . . establish . .. a sabbatical leave program"); § 23-3-5 (worker's compensation division "authorized to establish an electronic transfer program"); § 29-6-27 (civil service commission division of department of personnel "shall establish a [leave donation] program"); § 31-18A-5(14) (housing development fund empowered "to establish and supervise [a building inspection] program"

In sum, when the West Virginia legislature intends to grant a state officer, county, or municipality the power to create a corporation, it plainly so states. When the legislature intends to grant the lesser power to establish a "program," its language is equally clear. In W. Va. Code § 46A-7-102(1), the legislature only empowered the Attorney General to "establish programs." As McGraw recognized when serving as Chief Justice of the West Virginia Supreme Court of Appeals, "[w]here the language of a statute is clear and without ambiguity the plain meaning is to be accepted . . . ." Fralev v. Civil Service Comm'n, 356 S.E.2d 483, 484 (W. Va. 1987) (quoting State v. Elder, 165 S.E.2d 108, 109 (W. Va. 1968)). Thus, we must agree with the district court that formation of a "government agency" corporation clearly exceeds the power § 46A-7-102(1) provides to the Attorney General.

The only other source of authority that McGraw relies on is his constitutionally-based oath of office. Pursuant to this oath, the Attorney General swears to "faithfully discharge the duties of his said office to the best of his skill and judgment." W. Va. Const. art. IV, § 5. McGraw claims that the oath

empowered him to create his own "government agency" corporation.

In pursuing this argument, McGraw ignores the holding of West Virginia's highest court in State ex rel. Fahlgren Martin v. McGraw, 438 S.E.2d 338 (W. Va. 1993), specifically rebuffing his prior effort to expand the Attorney General's limited powers on the basis of this very oath. In Fahlgren Martin, McGraw asserted that his oath authorized him to investigate and prosecute potential illegalities in state contracts submitted to him for review. Id. at 343. The court unequivocally rejected this claim. Instead, it narrowly construed the oath's assignment of power, explaining that "the constitutional intent to promote good government does not grant the Attorney General the power or duty to investigate or prosecute [potential contractual illegalities]." Id. at 345. The court emphasized that the oath did not provide the Attorney General with any additional powers, explaining that "[a]s disappointing as it might be to any Attorney General . . . the powers of the Attorney General [in West Virginia] are strictly defined by Constitution and statute. This court does not have the right to create powers which, based upon constitutional and legislative history, were never intended." Id. McGraw does not even attempt to distinguish Fahlgren Martin, or the similar ruling of McGraw v. Caperton, 446 S.E.2d 921, 926 (W. Va. 1994), which relied on Fahlgren Martin, to reject McGraw's claim that the West Virginia Attorney General has the power to bring a declaratory judgment action in his official capacity.

McGraw points to no other source of authority empowering the Attorney General to form a "government agency" corporation, and we have found none.[5] This is entirely

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[5] In fact, we have found no mention of a "government agency corporation" in the statutes, regulations, or case law of West Virginia, let alone any reference to "a body politic a corporate instrumentality of government with limited agency and quasi-sovereign capacity." The fact that McGraw created an entity heretofore unknown to West Virginia law,

consistent with the fact that the West Virginia legislature, rather than its executive branch (or any member of that branch), is the body vested with the power to create government corporations. See Sims v. Fisher, 25 S.E.2d 216, 228 (W. Va. 1943) (Public corporations are "the creature and arm of the State" and are "created by special act [of the legislature]."). "A public corporation is an instrumentality of the State, founded and owned by the State in the public interest, supported by public funds, and governed by managers deriving their authority from the State." State v. Ohio Valley Gen. Hosp. Ass'n, 140 S.E.2d 457, 460 (W. Va. 1965). See also White v. Berryman, 418 S.E.2d 917, 924 n.15 (W. Va. 1992) (public corporations "are entities created by the legislature"); Cowan v. County Comm'n of Logan County, 240 S.E.2d 675, 678 (W. Va. 1977) (legislature alone has power to create public corporations or municipalities, but the "'Legislature may confer upon a court or some administrative officer or board the power to perform some judicial or ministerial act in the formation of such public corporations'. . .. The county commission, then, acts as an agency of the legislature performing a ministerial act in the formation of public corporations") (citing West v. West Virginia Fair Ass'n., 125 S.E. 353, 355-56 (W. Va. 1924)); Wiseman v. Calvert, 59 S.E.2d 445, 453 (W. Va. 1950) (same); W. Va. Const. art. VI, § 1 ("The legislative power shall be vested in a senate and house of delegates.").

As McGraw himself clearly proclaimed in Manchin, the duties of the West Virginia Attorney General are narrowly limited. 296 S.E.2d at 915. The Attorney General is not even the "chief law enforcement officer" of the state. Id. at 917. His role "is not to make public policy in his own right on behalf of the state." Id. at 920. Nor does his statutory authority authorize him "to assert his vision of state interest." Id. (citing Motor

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with personal funds no less, further evidences that he wandered far beyond the limits of his authority.

Club of Iowa v. Dept. of Transportation, 251 N.W.2d 510, 514 (Iowa 1977)). In light of these pronouncements, and the lack of any constitutional or statutory authority for McGraw's action, we hold that in forming his own "government agency" Better Government Bureau corporation McGraw performed an act a reasonable official in his position would have known was clearly established to be beyond the scope of his official duties. Accordingly, he cannot claim entitlement to qualified immunity for this conduct. The district court properly refused to grant McGraw summary judgment on this ground.[6]

II.

A.

We now turn to the second major question presented in these consolidated cases -- whether the attorney-client privilege or the opinion work product doctrine protected the information BGB sought from Barbara Allen, Esquire. The parties do not dispute the facts giving rise to this question.

Shortly after the Jividen memorandum and the Hechler response surfaced, the Attorney General's Office retained Allen. A letter, dated January 5, 1996, from two Managing Deputy Attorneys General memorialized the engagement. The letter, written on official Attorney General's Office stationery, states that Allen is being retained "as an independent

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[6] Without discussion, the district court noted that it "grant[ed] summary judgment to [BGB] on the issue of qualified immunity." Better Gov't, 904 F. Supp. at 533. In so stating, the court must have simply been emphasizing its denial of McGraw's motion for summary judgment on this issue. BGB did not move for, nor was it entitled to, affirmative relief on qualified immunity grounds. Qualified immunity is a defense. Siegert v. Gilley, 500 U.S. 226, 231 (1991). All that BGB claimed was that McGraw could not avail himself of that defense; the only relief BGB requested with regard to the qualified immunity issue was that the court deny McGraw's motion for summary judgment, which the court did.

consultant to investigate a situation of possible document mismanagement and confidentiality/security breaches. At the end of your investigation we envision a written report including findings and recommendations." Later that same day, one of the deputies wrote Allen a second letter, also on official stationery, "to clarify that your appointment to investigate the possible mismanagement of documents and breach of confidentiality is in your capacity as a lawyer. You are hereby appointed as Special Counsel to the Attorney General for the purposes of that investigation."

In the next few days, in response to the parties' joint motion, we remanded the immunity appeal to the district court, and that court granted BGB permission to engage in additional discovery regarding the making and alleged destruction of the newly discovered documents. During the following weeks, BGB deposed McGraw, Hechler, Senior Assistant Attorney General Daynus Jividen, former Chief Deputy Attorney General Fran Hughes, and Donna Willis (the secretary in the Attorney General's Office who leaked the Jividen memorandum to BGB).

Meanwhile, Allen plunged ahead, interviewing nine people: McGraw; Senior Assistant Attorneys General Charlene Vaughan, Larry Bohham, Carolyn Stafford, and Jividen; Hughes; McGraw's secretary, Jean Young; Hechler; and Willis. Allen conducted all interviews one on one, with no one present but Allen and the interviewee. Allen's notes and summaries of these interviews represent the sole records of these interviews. By the end of February, approximately seven weeks after being retained, Allen had expended between 70 to 100 hours on the project, with 20 to 25 hours spent in investigation and the remainder on drafting her report and doing a "great deal" of legal research.

BGB timely served Allen with a subpoena duces tecum, noting her deposition for February 21, 1996. Allen moved to quash the subpoena asserting the work product

doctrine and, on behalf of her client, the attorney-client privilege, and other privileges.

Immediately prior to Allen's scheduled deposition, the magistrate judge and the district court each held hearings and denied Allen's motion to quash, rejecting most of her privilege claims. Allen was ordered to attend the deposition and produce all documents responsive to the subpoena duces tecum that constituted fact work product. Allen was also instructed to prepare a privilege log detailing all other documents, or portions thereof, claimed to be protected from disclosure by attorney-client privilege or the opinion work product doctrine. The log was to set forth the date, author, and subject matter of all documents not produced and to indicate those individuals with whom all such documents had been shared. The court also directed Allen to submit any withheld documents that BGB challenged for in camera review.

When BGB took Allen's deposition on February 21, Allen declined to answer various questions or produce certain documents on the grounds of attorney-client privilege and opinion work product. By February 23, Allen had prepared and filed a detailed privilege log. She also simultaneously submitted the disputed documents to the court for in camera review.

On February 29, BGB moved to enforce the district court's previous orders. Again, the magistrate judge and the district court rejected the claim of attorney-client privilege for any of the documents. The magistrate judge did order that certain opinion work product be redacted from the documents; BGB does not challenge these redactions.

Allen continued to refuse to turn over most of the documents or to answer certain related questions on the grounds of attorney-client privilege and the opinion work product doctrine. Although acknowledging that Allen was acting in good faith, at her clients' behest, and to protect her clients' claims of privilege and opinion work product, BGB nonetheless moved that Allen be found in civil contempt.

After holding a hearing, the district court, on April 25, 1996, held Allen in civil contempt, and imposed a fine of $250.00 per day for each day she refused to comply with the court's orders. The district court refused Allen's request to stay the contempt sanctions pending appeal.

Allen and McGraw noted timely appeals of the district court's order rejecting the privilege claims and finding Allen in contempt. Allen also moved for a stay of the contempt sanctions pending appeal. On May 3, 1996, Judge M. Blane Michael, sitting as a single circuit judge, granted that motion and stayed the sanctions pending appeal. Prior to the entry of that order, Allen had paid $1,500.00 in fines pursuant to the district court's contempt sanction order. We expedited Allen and McGraw's appeals of the privilege issues and consolidated them with the qualified immunity appeal.

On appeal, Allen and McGraw maintain that attorney-client privilege, or the opinion work product doctrine, or both, prevent questions about, and disclosure of, all or part of eighteen documents.[7] Attorney client privilege is asserted as to sixteen of these documents. These include: (1) Allen's handwritten notes of interviews she conducted in January 1996 of McGraw and four of his assistant attorneys general, and her typed summaries of those notes (two sets of documents from each of five interviews, ten documents in all (Document nos. 1, 2, and 5-12)); (2) a partial draft report that Allen prepared during early February 1996 (Document no. 19); (3) Allen's

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[7] Allen submitted twenty documents for in camera review but on appeal no claim of attorney-client privilege or opinion work product is asserted as to two of these documents: Allen's summaries of her interviews with Jean Young (Document no. 18) and Donna Willis (Document no. 15). Allen turned both of these documents over to BGB, after the magistrate judge had redacted the portions of them that he found to be opinion work product. BGB does not appeal these redactions. (Allen's assertion on appeal that part of Document no. 15 was outside the scope of the subpoena duces tecum is meritless. Therefore, as the magistrate judge directed, that part of Document no. 15 must also be disclosed to BGB.)

handwritten notes of her January 17, 1996 interview of the former Chief Deputy Attorney General and her typed summary of those notes (two documents, nos. 3 and 4); (4) handwritten notes prepared on January 3, 1996 by deputy Attorney General Carolyn Stafford (Document no. 13); (5) a timeline of the activities of Donna Willis, which Stafford prepared at Allen's request (Document no. 14); and (6) a collection of certain employment records of Donna Willis (Document no. 20). Allen and McGraw also assert that portions of some of these documents constitute opinion work product. Attorney-client privilege is not asserted as to the remaining two documents -- handwritten notes and a typed summary of Allen's January 18, 1996 interview with Secretary of State Hechler (Documents nos. 16 and 17). Allen and McGraw do maintain, however, that portions of these documents constitute opinion work product.

B.

We turn first to the claim of attorney-client privilege made with regard to communications between members of the Attorney General's Office and Allen.

Like all privileges, the attorney-client privilege "interferes with the truth seeking mission of the legal process," and therefore is not "favored." United States v. Aramony, 88 F.3d 1369, 1489 (4th Cir. 1996). The Supreme Court, however, has expressly recognized that the attorney-client privilege enjoys a special position as "the oldest of the privileges for confidential communications known to the common law" and that the privilege serves a salutary and important purpose: to "encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice." Upjohn Co. v. United States, 449 U.S. 383, 389 (1981). Accordingly, if a party demonstrates that attorney-client privilege applies, the privilege affords all

communications between attorney and client absolute and complete protection from disclosure. See In re Grand Jury Proceedings, 1996 WL 732101 at *2, ___ F.3d ___, ___ (4th Cir. 1996) ("No doubt exists that under normal circumstances, an attorney's advice provided to a client, and communications between attorney and client are protected by attorney-client privilege.").

A party asserting the privilege must demonstrate:

> (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is act ing as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.

United States v. Tedder, 801 F.2d 1437, 1442 (4th Cir. 1986) (quoting United States v. United Shoe Machinery Corp., 89 F. Supp. 357, 358-59 (D. Mass. 1950)), cert. denied, 480 U.S. 938 (1987).

BGB, as it forthrightly acknowledges, has never questioned "[i]n its numerous briefs on the contempt issues" that the Attorney General has established most of these criteria. See Brief of Appellees at 57. Thus, BGB makes no claim that the Attorney General and his Office were not Allen's clients. (For this reason when referring to Allen's clients, we refer to McGraw and the Office interchangeably

herein.) Nor does BGB assert that Allen is not a member of the bar, that the privilege was ever waived, or that any communications were made for the purpose of committing a crime or tort.[8]

Rather, BGB focuses solely on Allen's role when the communications at issue occurred, and the purpose of those communications. BGB asserts that Allen acted as an investigato rather than as an attorney, and consequently, the client communications at issue here were not made for the purpose of securing legal services. The magistrate judge and the district court so held, concluding for this reason that the attorney-client privilege did not protect the communications between Allen and her clients made during the investigation.

The parties agree that our standard of review is twofold. To the extent a district court's holding that the attorney-client privilege does not protect communications "rest[s] essentially on determinations of fact," we review those determinations for "clear error." United States v. Aramony, 88

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[8] Nor does BGB maintain that the attorney-client privilege is inapplicable to communications between a governmental officer or entity and the officer or entity's attorney. The district court expressly held "governmental officials can rely on the attorney-client privilege to protect confidential communications in certain circumstances." Better Gov't, 924 F. Supp. at 733. That holding accords with the relevant authority. See, e.g., Coastal States Gas Corp. v. Dep't. of Energy, 617 F.2d 854, 863 (D.C. Cir. 1980) ("[I]t is clear that an agency can be a 'client' and agency lawyers can function as 'attorneys' within the relationship contemplated by the privilege"); Green v. Internal Revenue Service, 556 F.Supp. 79, 85 (N.D. Ind. 1982) (privilege is unquestionably applicable to relationship between government attorneys and administrative personnel), aff'd, 734 F.2d 18 (7th Cir. 1984); Resolution Trust Corp. v. Diamond, 137 F.R.D. 634, 643 (S.D.N.Y. 1991) (government agencies may invoke privilege, but bear same burden as do private parties of establishing its applicability); In the Matter of Grand Jury Subpoenas Duces Tecum, 574 A.2d 449, 454 (N.J. Super. Ct. App. Div. 1989) ("[W]e have no hesitancy in holding that the privilege is fully applicable to communications between a public body and an attorney retained to represent it."). See also NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 153 (1975).

F.3d at 1389 (quoting Sheet Metal Workers Int'l Ass'n v. Sweeney, 29 F.3d 120, 123 (4th Cir. 1994)). Our review is de novo, however, to the extent the court's holding rests on application of controlling legal principles to the facts. See In re Grand Jury Proceedings, Thursday Special Grand Jury, 33 F.3d 342, 353 (4th Cir. 1994). See also In re Grand Jury Proceedings, 1996 WL 732101 at *4, ___ F.3d at ___.

The principal error in the district court's holding is a legal one. The court apparently believed that if a client retains an attorney to perform the "rudimentary" task of conducting an investigation, that assignment can never constitute legal work and so the attorney-client privilege does not protect communications between the client and the investigating attorney. Better Gov't, 924 F. Supp. at 733 n.5. The Supreme Court's landmark decision in Upjohn renders this theory untenable.

In Upjohn, a corporation's in-house general counsel conducted an internal "factual" investigation of "questionable payments" that some of the corporation's subsidiaries had made to foreign governments. 449 U.S. at 387-89. This investigation, which involved in-house counsel requesting certain employees to complete a questionnaire and interviewing those and other employees, was the only legal work at issue in Upjohn. Explaining that the attorney-client privilege "exists to protect not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice," 449 U.S. at 390, a unanimous Supreme Court held that the privilege protected the questionnaires and the attorney-investigators' notes of their interviews with Upjohn employees. Although the focus of Upjohn's analysis was on whether the scope of the privilege included communications to counsel by employees outside the corporation's "control group," the Court's affirmative answer to this question necessarily implies a recognition that an

attorney's investigation may constitute a legal service, encompassed by the privilege.

Indeed, the Supreme Court in Upjohn expressly noted that "[t]he first step in the resolution of any legal problem is ascertaining the factual background and sifting through the facts with an eye to the legally relevant." Id. at 390-91. By itself this statement demonstrates the defect in the district court's reasoning that"legal counsel is not necessary" to perform the "rudimentary" function of conducting an investigation. Better Gov't, 924 F. Supp. at 733 n.5.[9]

But the Upjohn pronouncement hardly stands alone. Courts have consistently recognized that investigation may be an important part of an attorney's legal services to a client. See, e.g., United States v. Rowe, 96 F.3d 1294, 1297 (9th Cir. 1996); Dunn v. State Farm & Casualty Co., 927 F.2d 869, 875 (5th Cir. 1991) (applying Mississippi law); In re Grand Jury Subpoena, 599 F.2d 504, 510-11 (2d Cir. 1979); Diversified Indus. v. Meredith, 572 F.2d 596, 606-10 (8th Cir. 1977) (en banc hearing 1978); Arcuri v. Trump Taj Mahal Assocs., 154 F.R.D. 97, 104 (D.N.J. 1994); In re Int'l Sys. & Controls Corp. Sec. Litig., 91 F.R.D. 552, 557 (S.D. Tex. 1981), vacated on other grounds, 693 F.2d 1235 (5th Cir. 1982); In re LTV Sec. Litig., 89 F.R.D. 595, 599-611 (N.D. Tex. 1981); In re Grand Jury Subpoena, 478 F. Supp. 368, 371-73 (E.D. Wis. 1979). Indeed, BGB itself relies on a case in which the court expressly held that"the attorney-client privilege encompasses

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[9] The district court's suggestion that the Attorney General's Office "likely has a staff of investigators" undermines rather than supports the court's conclusion that the Office did not hire Allen in her capacity as an attorney. Better Gov't, 924 F. Supp. at 733 n.5. If the Attorney General's Office simply needed a lay investigator to collect and summarize information, it could have used its own staff and avoided the expense of retaining outside legal counsel. The very retention of outside counsel indicates that the Office wanted someone who could collect and "sift[ ] through the facts with an eye to the legally relevant." Upjohn, 449 U.S. at 390-91.

factual investigations by counsel." United States v. Davis, 131 F.R.D. 391, 398 (S.D.N.Y. 1990).[10]

Of course, not all communications between an attorney and client during attorney-conducted investigations constitute legal work entitled to attorney-client privilege. For example, no privilege attaches when an attorney performs investigative work in the capacity of an insurance claims adjuster, rather than as a lawyer. See Harper v. Auto Owners Ins. Co., 138 F.R.D. 655, 671 (S.D. Ind. 1991); Mission Nat'l Ins. Co. v. Lilly, 112 F.R.D. 160, 163 (D. Minn. 1986). But even in these cases the courts did not suggest, let alone hold, that investigation can never constitute legal work. Quite the contrary, they carefully instructed that only "[t]o the extent" attorneys acted as claims adjusters, a "pure, ordinary business function," was their investigation "outside the scope of the asserted privileges." Mission Nat'l, 112 F.R.D. at 163. See also Harper, 138 F.R.D. at 671 ("To the extent this attorney acted

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[10] In Davis, a government contract case, the government and the contractor sought documents from each other and each party asserted attorney-client privilege. In the course of its opinion, the court unremarkably recognized that for communications to be privileged, an attorney" must be functioning as an attorney" and that attorney-created documents whose "primary purpose" was "business negotiations" rather than "legal advice were not privileged." Davis, 131 F.R.D. at 401. The court also held, however, that the attorney-client privilege protected communications made by a government official to a FBI agent investigating a matter for government attorneys. Id. at 398. In fact, the Davis court concluded that all investigative materials were protected by either attorney-client privilege or the work product doctrine. Id. at 403-408. The only other cases BGB relies on to support its argument that investigation does not constitute legal work are North American Mortgage Investors v. First Wisconsin Nat'l Bank of Milwaukee, 69 F.R.D. 9 (E.D. Wis. 1975), and City of Virginia Beach v. U.S. Dep't of Commerce, 805 F. Supp. 1323 (E.D. Va. 1992), aff'd in part, rev'd in part on other grounds, 995 F.2d 1247 (4th Cir. 1993). Both cases concluded that the mere performance by a lawyer of a task does not privilege communications made during that task; neither holds (nor suggests) that an attorney's investigation never constitutes privileged legal work.

as a claims adjuster, claims process supervisor, or claim investigation monitor, and not as a legal advisor, the attorney-client privilege would not apply.").

Thus, even these cases are entirely consistent with the great body of law holding that confidential communications made to attorneys "hired to investigate through the trained eyes of an attorney" are privileged. In re International Sys., 91 F.R.D. at 557. As the court explained in In re LTV Securities Litig., when rejecting the argument that the privilege should not apply when the attorneys involved performed an "investigative rather than strictly legal" function:

> [W]hile in house accountants or lay investigators could have been employed to investigate the events in question, neither would have brought to bear the same training, skills and background possessed by attorneys and necessary to make the professional independent analysis and legal recommendations sought by the LTV Board of Directors.

89 F.R.D. at 600-01. In sum, Upjohn made "clear that fact finding which pertains to legal advice counts as professional legal services." Rowe, 96 F.3d at 1297 (internal citations omitted). See also In re Grand Jury Subpoena, 599 F.2d at 510 (investigation by law firm retained to investigate and provide legal advice based on that investigation "trigger[s] the attorney-client privilege").[11]

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[11] Our good colleague in dissent suggests that because Allen was engaged to investigate the Attorney General's Office, communications made between Allen and employees of that Office, who may have been "targets" of the investigation, should not be protected by attorney-client privilege. Upjohn forecloses this contention. In Upjohn, counsel for a corporation sought and obtained information from numerous employees of that corporation as part of an investigation of "possibly illegal" payments made by the corporation to foreign government officials. 449 U.S. at 386. The

Accordingly, we must reject the legal theory espoused by district court that the attorney-client privilege does not apply here, simply because Allen's assigned duties were investigative in nature.[12] The relevant question is not whether Allen was retained to conduct an investigation, but rather, whether this investigation was "related to the rendition of legal services." Dunn, 927 F.2d at 875. If it was, and it clearly was

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Upjohn employees who were interviewed by the corporation's counsel were in precisely the same position as the employees of the Attorney General's Offices whom Allen interviewed. The Supreme Court held that the attorney-client privilege protected communications between Upjohn's counsel and its employees, regardless of rank, because the communications were made in order to formulate and render legal advice to the corporation itself. Id. at 389-397. Neither the dissent nor BGB claim that a governmental entity cannot avail itself of attorney-client privilege to the same extent as a corporation. See supra n.8. Of course, the underlying facts communicated between a corporate or governmental entity's employees and its counsel are not privileged and BGB, like the Government in Upjohn, 449 U.S. at 395, is free to obtain these facts by questioning the same employees.

[12] The district court also concluded that the "general policies favoring disclosure" in 42 U.S.C. § 1983 cases create an extra barrier for a § 1983 defendant asserting attorney-client privilege. Better Gov't, 924 F. Supp. at 733-34. There is no support for this legal theory either. In the cases upon which the district court and BGB rely, the courts refused to recognize or extend other privileges because to do so would prevent civil rights plaintiffs from discovering critical facts. See, e.g., Skibo v. City of New York, 109 F.R.D. 58, 63-64 (E.D.N.Y. 1985) (claims of "self critical analysis" privilege and executive privilege did not bar discovery of Internal Affairs Division's Procedural Manual and employee effectiveness evaluations in excessive force case when documents sought were the "only available source of the information"). The rationale of those cases does not apply here, even by analogy, because, as noted within, the attorney-client privilege does not protect underlying facts, only attorney-client communications about these facts. Upjohn, 449 U.S. at 395. Thus, no privilege prevents BGB from interviewing, indeed deposing, every witness Allen interviewed, and so obtaining the same facts. What BGB may not do is ask Allen or her clients what they said to each other.

here, then "[t]he privilege is not waived." Id. See also Rowe, 96 F.3d at 1297.

To the extent the district court's conclusion to the contrary constituted a factual finding, it was clearly erroneous. Examination of the record permits only one conclusion: Allen was retained to conduct an investigation using her legal expertise. Abundant evidence unequivocally supports this conclusion, and no evidence contradicts it.

In reaching a contrary conclusion, the district court appeared to rely on the engagement letters, and Allen's similar description of her charge set forth in her motion to quash the subpoena. Id.[13] The first engagement letter, dated January 5, 1996, signed by Managing Deputy Attorneys General Deborah Henry and William Steele states:

> Thank you for meeting with us yesterday. Based upon our discussions, we would like to retain you as an independent consultant to investigate a situation of possible document mismanagement and confidentiality/security breaches. At the conclusion of your investigation we envision a written report including findings and recommendations.

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[13] The district court may also have relied on two newspaper articles that characterize Allen as a "special investigator." Id. The articles, of course, constitute unsworn hearsay, entitled to no weight. See, e.g., Pan-Islamic Trade Corp. v. Exxon Corp., 632 F.2d 539, 556-57 (5th Cir.), reh'g denied, 642 F.2d 1210 (5th Cir. 1980), cert. denied, 454 U.S. 927 (1981). BGB does not make any serious argument to the contrary but simply asserts that consideration of them, if error, was harmless. Even if credited, the articles hardly prove Allen acted solely as an investigator, rather than as a lawyer using legal expertise to conduct an investigation; the articles described Allen as a lawyer who had been "hired to investigate" and "provide a report as quickly as possible." Associated Press, McGraw Hires Investigator, Charleston Daily Mail, January 6, 1996; Associated Press, West Virginia Investigating Missing File Case, The Columbus Dispatch, January 6, 1996.

> This is to confirm that we agreed upon an hourly rate of $125.00 for your services.

The second letter, which Henry alone sent by facsimile later the same day, states:

> I am writing to clarify that your appointment to investigate the possible mismanagement of documents and breach of confidentiality is in your capacity as a lawyer. Thus, you are hereby appointed as Special Counsel to the Attorney General for the purpose of that investigation.

In the memorandum in support of her motion to quash, Allen echoed that she had been appointed as "Special Counsel to the Attorney General for the purpose of investigating possible breach[es] of confidentiality within the Office of the Attorney General and possible mismanagement of documents within the Office of the Attorney General."

The district court apparently regarded the second engagement letter's statement that Allen was hired in her "capacity as a lawyer" as an after-the-fact, self-serving attempt to shield relevant, damaging facts from disclosure and so refused to be bound by this statement. Better Gov't, 924 F. Supp. at 733. Of course, attorney-client privilege is never "available to allow a [client] to funnel its papers and documents into the hands of its lawyers for custodial purposes and thereby avoid disclosure." Radiant Burners v. American Gas Ass'n, 320 F.2d 314, 324 (7th Cir.), cert. denied, 375 U.S. 929 (1963). But we find it difficult to understand why the second letter is suspect in view of the fact that, as BGB acknowledges, it was sent the same day as the first letter, and before Allen conducted any interviews. Since attorney-client privilege protects only the disclosure of client communications, and not the disclosure of any underlying facts, Upjohn, 449 U.S. at 395, a client cannot possibly hide

information simply by communicating it to his lawyer; BGB could have simply deposed each of the parties that Allen interviewed and discovered this information itself.

However, with or without the second letter, a court cannot reasonably infer from the record in this case that Allen acted as an "investigator solely and not as both investigator and lawyer." Better Gov't, 924 F. Supp. at 733 n.5. Rather, the record clearly indicates, as both the first engagement letter and Allen's description of her task in her motion to quash expressly state, that the Attorney General's Office retained a lawyer, Allen, to investigate and prepare "a written report including findings and recommendations." Obviously, as BGB points out, Allen's status as an attorney, is not, in itself, sufficient to establish she was hired to do legal work. But just as obviously, clients often do retain lawyers to perform investigative work because they want the benefit of a lawyer's expertise and judgment. As Upjohn and its progeny demonstrate, if a client retains an attorney to use her legal expertise to conduct an investigation, that lawyer is indeed performing legal work.

In addition to the documents upon which the district court seemed to rely, i.e. the engagement letter and the motion to quash, other evidence, apparently not examined by the district court, further supports the conclusion that the Attorney General's Office retained Allen to use her legal talents and judgment in conducting the investigation. For example, at deposition, in response to questions from BGB's counsel, Allen explained that of the 70 to 100 hours this assignment consumed, she spent only 20 to 25 hours on investigation per se, spending the remainder of her time on legal tasks -- researching legal issues, preparing memoranda of interviews, and composing her written report. BGB did not and does not suggest that Allen lied in so testifying under oath. Nor did BGB offer any evidence contrary to this testimony.

Similarly, William Steele, one of the two Managing Deputies who signed the letter retaining Allen, stated in a sworn affidavit that "Mrs. Allen was specifically asked not

only to investigate but also to make findings and recommendations to the Attorney General and the Office. We anticipated that her findings and recommendations would be based on her investigation, her factual and legal analysis, and her experience as an attorney." Steele emphasized that "there was and is no question in my mind that [Allen] was retained in her capacity as an attorney."

Furthermore, Allen's interview memoranda evidence that her understanding of the underlying legal issues dictated the direction of the interviews. Additionally, examination of the draft of Allen's report indicates it is not the type of report one would expect of a lay investigator. Rather, the report, though incomplete, contains legal conclusions as to past events, as well as recommendations for future conduct, conclusions which only a lawyer is qualified to make.

In short, when controlling legal principles are applied to the undisputed record evidence, a court must conclude that the Attorney General's Office retained Allen to conduct an investigation in her capacity as an attorney, for the purpose of providing legal services and advice. Therefore, the attorney-client privilege protects all communications between Allen and the attorneys in the Attorney General's Office that occurred in connection with her investigation. For this reason, Allen need not respond to questions regarding the substance of these communications, and she need not produce her notes or summaries of interviews of McGraw or any of his assistants (Document nos. 1, 2, 5-12) or her draft report (Document no. 19), all of which constitute privileged communications between attorney and client.

C.

The attorney-client privilege is also claimed for several other communications.

First, it is asserted that the privilege protects Allen's notes and summaries of her interviews of Fran Hughes, a

former Chief Deputy Attorney General (Document nos. 3 and 4). Although Hughes served as a member of the Attorney General's Office during the time frame relevant to the activities Allen investigated, Hughes was not employed by the Office at the time of her interview with Allen.

BGB does not assert that communications with former employees should be entitled to any less protection than communications with a client's current employees receive. The Supreme Court in Upjohn left open the question of whether the scope of the attorney-client privilege extends to include communications with former, as well as current, employees. 449 U.S. at 394 n.3. However, in a concurring opinion, Chief Justice Burger indicated his belief that the privilege should apply to communications by former employees: "in my view the Court should make clear now that, as a general rule, a communication is privileged at least when, as here, an employee or former employee speaks at the direction of the management with an attorney regarding conduct or proposed conduct within the scope of employment." Id. at 402-03 (Burger, C.J., concurring).

Most lower courts have followed the Chief Justice's reasoning and granted the privilege to communications between a client's counsel and the client's former employees. See In re Coordinated Pretrial Proceedings in Petroleum Prod. Antitrust Litig., 658 F.2d 1355, 1361 n.7 (9th Cir. 1981) (The Upjohn "rationale applies to the exemployees . . . involved in this case. Former employees, as well as current employees, may possess the relevant information needed by corporate counsel to advise the client. . . ."), cert. denied, 455 U.S. 990 (1982); Admiral Ins. Co. v. United States Dist. Ct. for Dist. of Arizona, 881 F.2d 1486, 1493 (9th Cir. 1989) (relying on Coordinated Pretrial Proceedings); Porter v. Arco Metals Co., 642 F. Supp. 1116, 1118 (D. Mont. 1986) (Upjohn indicates that "the attorney-client privilege may extend to [defendant's] former employees . . . [with regard to their communications with] the company's counsel."); United States v. King, 536 F.

Supp. 253, 259 (C.D. Cal. 1982) ("[The attorney-client] relationship existed even though[the witness] was not an employee of [the client] at the time of the conversation."), overruled on other grounds by United States v. Zolin, 842 F.2d 1135 (9th Cir. 1988); Amarin Plastics v. Maryland Cup Corp., 116 F.R.D. 36, 41 (D. Mass. 1987) ("In some circumstances, the communications between a former employee and a corporate party's counsel may be privileged.").[14]

In light of the purpose underlying the privilege, this conclusion seems warranted. The Supreme Court has explained that the attorney-client privilege "rests on the need for the advocate and counselor to know all that relates to the client's reasons for seeking representation of the professional mission is to be carried out." Trammel v. United States, 445 U.S. 40, 51 (1980). The Court reiterated this "need to know" focus in Upjohn: "the privilege exists to protect not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice." 449 U.S. at 390. In rejecting the "control group" test for determining which employees are within the scope of a corporation's attorney-client privilege, the Upjohn Court recognized that "it will frequently be employees beyond the control group . . . who will possess the information needed by the corporation's lawyers." Id. at 391.

Accordingly, we hold that the analysis applied by the Supreme Court in Upjohn to determine which employees fall

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[14] Those courts that have denied the privilege to communications between the client's attorney and former employees have generally been following state law or concluded that the former employee had ceased being employed by the client before the relevant conduct occurred. Nakajima v. General Motors, 857 F.Supp. 100, 104 (D.D.C. 1994) (D.C. law); Barrett Industrial Trucks v. Old Republic Ins. Co., 129 F.R.D. 515, 517-18 (N.D. Ill. 1990) (Illinois law); Connolly Data Sys. v. Victor Technologies, 114 F.R.D. 89, 93-94 (S.D. Cal. 1987) (California law). Of course, state law does not apply in this § 1983 action, and it is undisputed that the Attorney General's Office did employ Hughes during the relevant time frame.

within the scope of the privilege applies equally to former employees. In this case, the Attorney General's Office employed Hughes during the time period in question and she possessed information relevant to Allen's investigation. Allen interviewed Hughes at the direction of her client, in order to provide legal advice to her client. Moreover, Allen needed the information that Hughes could provide in order to develop her legal analysis for her client. Consequently, Allen's notes and summary of her interview with Fran Hughes (Document nos. 3 and 4) are protected, and Allen need not answer questions regarding her interview with Hughes.

The attorney-client privilege is also claimed to protect the collection of certain employment records of Donna Willis (Document no. 20). Although attorneys in the Attorney General's Office created portions of these documents, the records do not contain communications by those attorneys to Allen for her legal advice. Indeed, most of these records appear to pre-date Allen's engagement. Accordingly, the attorney-client privilege does not protect Document No. 20.

The last two documents for which the attorney-client privilege is asserted are certain handwritten notes (Document no. 13) and a timeline of Donna Willis' activities (Document no. 14). Although the table of contents to the documents submitted for in camera review states that Document no. 13 consists of "handwritten notes prepared on January 3, 1996 by Carolyn Stafford," the summary of this document states that it consists of "Handwritten Interview Notes of Interview with Carolyn Stafford, Deputy Attorney General." The document itself includes five pages of handwritten notes in which the author is unnamed; two pages of the notes seem to be dated,"4-10-95" and "6-7-95," well before the date on which Allen was retained, January 3, 1996. For this reason, we simply cannot determine from examination of the record the author, purpose, or timeframe of these notes and so cannot determine whether attorney-client privilege applies. On remand, the district court should make these determinations.

Only if the court concludes that the notes were prepared by Allen, or by a member of the Attorney General's Office at her request, after that Office retained her, and that the notes were to assist her in performing the investigation and giving advice to her client, does attorney-client privilege attach. Otherwise, no privilege applies.

Document no. 14, the "Timeline for Donna Willis prepared by Carolyn Stafford at Barbara Allen's request" presents similar problems. While not mislabelled, neither the table of contents, nor the summary, nor the timeline itself, indicate when Stafford prepared the timeline for Allen. This deficiency again prevents us from determining whether the privilege protects the timeline. If Stafford prepared the timeline prior to the time that the Attorney General's Office retained Allen, the document is not privileged; if a member of the Attorney General's Office prepared the timeline for Allen after she was retained to aid her in performing her investigation and report, the timeline is privileged. Again, we leave these determinations to the district court's careful analysis on remand.

D.

Finally, we address Allen's claims that opinion work product protects some of the documents submitted for in camera review. Because we have already held attorney-client privilege applies to certain documents or because the opinion work product doctrine is not asserted as a shield to discovery, this inquiry involves only three documents. These are: Allen's handwritten notes of and typewritten summary of her interview with Secretary of State Hechler (Document nos. 16 and 17), and Allen's selection and collection of certain of Donna Willis' employment records (Document no. 20).

In contrast to fact work product, which is discoverable "upon a showing of both a substantial need and an inability to secure the substantial equivalent of the materials by alternate

means without undue hardship," opinion work product "enjoys a nearly absolute immunity and can be discovered only in very rare and extraordinary circumstances." In re Grand Jury Proceedings, Thursday Special Grand Jury, 33 F.3d 342, 348 (4th Cir. 1994). Accord National Union Fire Ins. v. Murray Sheet Metal, 967 F.2d 980, 984 (4th Cir. 1992). See also Fed. R. Civ. P. 26(b)(3). Courts carefully guard opinion work product from disclosure to an opposing party, fearing that otherwise "[a]n attorney's thoughts, heretofore inviolate, would not be his own." Hickman v. Taylor, 329 U.S. 495, 511 (1947). Furthermore, revealing an attorney's thoughts and opinions to an opposing party runs contrary to the principles underlying the adversary process. "Discovery was hardly intended to enable a learned profession to perform its functions . . . on wits borrowed from the adversary." Hickman, 329 U.S. at 516 (Jackson, J., concurring). If courts failed to protect opinion work product, lawyers would lose the incentive to do thorough research, relying instead on the opposing party's effort; clients and our adversary system would suffer as a result.

To qualify for protection under the work product doctrine, a lawyer must create the document in anticipation of litigation. In re Grand Jury Proceedings, 33 F.3d at 348. Once that threshold is met, opinion work product is that which contains an attorney's"mental impressions, conclusions, opinions or legal theories . . . concerning the litigation." National Union, 967 F.2d at 984 (internal quotation marks omitted). If material constitutes opinion work product it is "absolutely immune from discovery" whether it was "actually prepared by the attorney or another representative of the party." Id. (internal quotation marks omitted). With these principles in mind, we turn to examination of the three documents at issue here.

Most of Document no. 16, Allen's handwritten notes of her interview with Hechler, has already been produced. Allen does seek to shelter, as opinion work product, a portion of

page 2 of this document. In describing this item in the material submitted for in camera review, Allen states, "[t]he entry [is] covered with editing tape which I couldn't get off; however, the entry can be read[ ] if the page [of the original document] is held up to the light." We have examined the record for this entry -- the original documents submitted for in camera review are missing. Accordingly, we cannot make any assessment as to this document. On remand, the district court, in view of the principles set forth within, should assess whether this entry constitutes opinion work product.

Document no. 17 is Allen's typewritten summary of her interview with Secretary of State Hechler. BGB has already received certain redacted portions of this document. Allen seeks to prevent disclosure of the remainder of the document. Clearly Allen prepared the summary in anticipation of litigation. She was hired in the midst of this very litigation because her client failed to produce a relevant document requested in discovery; part of her charge was to investigate why this happened and make recommendations for the future. Moreover, as the district court recognized, all parties anticipated further litigation growing out of Donna Willis' discharge. Not only did Allen repare the document in anticipation of litigation, but the information Allen gained from Hechler, later memorialized in her interview summary, tends to indicate the focus of her investigation, and hence, her theories and opinions regarding this litigation. See Upjohn, 449 U.S. at 399 ("Forcing an attorney to disclose notes and memoranda of witnesses' oral statements is particularly disfavored because it tends to reveal the attorney's mental processes."). Accord Cox v. Administrator U.S. Steel & Carnegie, 17 F.3d 1386, 1422 (11th Cir.) ("In Upjohn, the Supreme Court made clear that an attorney's notes and memoranda of a witness's oral statements is considered to be opinion work product."), modified on reh'g, 30 F.3d 1347 (11th Cir. 1994), cert. denied, 115 S.Ct. 900 (1995). For these reasons, we agree with Allen that the contested portions of this

document constitute opinion work product; she need not disclose them.

Finally, we turn to Document no. 20. It contains pages of selected employment records concerning Donna Willis, which Allen requested that Carolyn Stafford and Charlene Vaughn provide to her. We have held that attorney-client privilege does not protect these records. Yet, just as Allen prepared the interview notes and summaries in anticipation of litigation, she also chose and arranged these records in anticipation of litigation. This choice and arrangement constitutes opinion work product because Allen's selection and compilation of these particular documents reveals her thought processes and theories regarding this litigation. See, e.g., Shelton v. American Motors Corp., 805 F.2d 1323, 1329 (8th Cir. 1986) ("In cases that involve reams of documents and extensive document discovery, the selection and compilation of documents is often more crucial than legal research. . . . We believe [counsel's] selective review of [her clients'] numerous documents was based on her professional judgment of the issues and defenses involved in this case."); Sporck v. Peil, 759 F.2d 312, 316 (3d Cir.) ("We believe that the selection and compilation of documents in this case in preparation for pretrial discovery falls within the highly-protected category of opinion work product."), cert. denied, 474 U.S. 903 (1985). See also James Julian v. Raytheon Co., 93 F.R.D. 138, 144 (D. Del. 1982) ("In selecting and ordering a few documents out of thousands counsel could not help but reveal important aspects of his understanding of the case.").

Thus, the opinion work product doctrine protects Document no. 20 from disclosure. We emphasize that this conclusion does not protect Donna Willis' personnel records from disclosure, just Allen's selection and arrangement of them. BGB remains free to seek, by proper discovery request, Willis' personnel records, as well as any witness's sworn testimony or any other factual material.

III.

In sum, with regard to the qualified immunity appeal, No. 96-1652, we affirm the district court's denial of McGraw's motion for summary judgment. As for the appeals of the contempt order, Nos. 96-1464 and 96-1601, we reverse and remand. We hold that attorney-client privilege protects disclosure of the notes and summaries of Allen's interviews with attorneys in the Attorney General's Office, including former Chief Deputy Hughes, as well as the draft of her report. (Document nos. 1-12 and 19). BGB cannot force Allen to answer questions regarding those interviews and that report. Further, the opinion work product doctrine protects the portions of Allen's typed summary of her interview with Hechler that BGB has not previously received, as well as Allen's collection and selection of Donna Willis' employment records. (Document nos. 17 and 20). We, therefore, reverse the district court's order holding Allen in contempt. We remand the case for the district court to make the further privilege determinations with regard to Document nos. 13, 14, and 16 in accordance with this opinion.

No. 96-1652 is
AFFIRMED.

Nos. 96-1464 and 96-1601 are
REVERSED AND REMANDED.

NIEMEYER, Circuit Judge, concurring in part and dissenting in part:

I concur in part I and part II D of the opinion for the court; I dissent from parts II A-C addressing the district court's application of the attorney-client privilege.

The party asserting the attorney-client privilege carries the burden of establishing, inter alia, that he is a client; that the

person to whom the communication was made was acting as an attorney; that the communications for which he claims the attorney-client privilege were confidential and took place between him and his lawyer and concerned matters on which the lawyer was representing him; that the communication was not for the purpose of committing a crime or tort; and that he has not waived the privilege. While I do not disagree with many of the legal principles announced by the majority with respect to the nature and scope of the attorney-client privilege, I conclude that the majority has failed to apply its own principles correctly to the circumstances of this case.

Following hearings and the examination of relevant documents, the district court was not persuaded that Barbara Allen was acting as an attorney in her work for the West Virginia Attorney General's office. The district court examined the circumstances leading up to Allen's engagement and the engagement documentation and concluded that "the court is concerned about the bona fides of McGraw's claim that Barbara Allen was hired and retained as an attorney." The majority has simply sidestepped this conclusion and substituted its own. Moreover, the majority has not addressed the question of whether Allen was retained to do the work of an attorney. Apparently the Attorney General hired her in response to leaks of documentation revealing potential misconduct by the Attorney General with the purpose of discovering the source of the leaks and disciplining the offending persons. Such work could have been done equally by an investigator, detective, or police officer. As the district court found, however, the Attorney General elected to engage Allen with the purpose of shielding from public view the product of such an investigation. Against these facts, I do not believe we can conclude that the district court erred.

At least as troubling to me is the unwillingness of the majority to focus on the identity of Allen's client. The Attorney General claims that the client was the Attorney General and the Attorney General's office. The purpose of the investigation,

however, was to investigate the Attorney General's office and discover who was leaking information. Thus, the Attorney General would have to be urging that Barbara Allen was retained to represent both the investigator and the targets of the investigation. The majority is correct to note that a governmental entity can avail itself of Upjohn's protections. Slip op. at 34, n.11. But Upjohn's shield protects an entity's ability to use its employees in the formulation of its own legal position. In this case, in contrast, the employees were the targets of Allen's investigation and so had interests which are clearly adverse to the person the majority considers to be their own attorney. The majority's reasoning thus extends Upjohn's privilege to protect an entity's attorney's discussions with adverse persons.

If the targets of the investigation were not clients, as I would suppose, then the attorney-client privilege would not protect notes of Allen's interviews with these persons under the long-standing line of cases cited by the majority that leaves unprotected factual investigations that do not involve typical attorney work. See, e.g., Harper v. Auto-Owners Ins. Co., 138 F.R.D. 655, 671 (S.D. Ind. 1991); Mission Nat'l Ins. Co. v. Lilly, 112 F.R.D. 160, 162-63 (D. Minn. 1986). If, on the other hand, we were to suppose that the targets of Allen's investigation were also her clients, then we have the unseemly and perhaps illegal suggestion that Allen was representing two opposite sides of a potentially illegal activity. Moreover, she would be in the untenable position of revealing the communications of her clients (the targets of the investigation) to those who would discipline them.

While the majority has stated general principles of attorney-client privilege with which no one can disagree, it has simply not come to grips with the nature of the engagement, the identity of the client, the absence of communications between attorney and client that did not conceal illegal activity or concerning which the privilege has not been waived.

In such a complex factual circumstance which involves numerous documents, we should defer to the district court which has become familiar with the factual context and documents and has had to make factual findings and legal judgments based on its knowledge. I would not find any of the district court's findings clearly erroneous, nor do I disagree with the district court's rulings that addressed the attorney-client privilege. Accordingly, I would affirm the district court's rulings on the attorney-client privilege issues.

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF
WEST VIRGINIA,
CHARLESTON DIVISION

BETTER GOVERNMENT BUREAU, INC.,
an Ohio Corporation,

Plaintiff,

vs.

DARRELL V. McGRAW, JR., ATTORNEY GENERAL
OF THE STATE OF WEST VIRGINIA,
personally and in his official capacity and
BETTER GOVERNMENT BUREAU, OFFICE OF THE
ATTORNEY GENERAL STATE OF WEST VIRGINIA,
a Body Politic, A Corporate Instrumentality of Government
with Limited Agency and Quasi-Sovereign Capacity, and
KEN HECHLER, SECRETARY OF STATE,
in his official capacity,

Defendants.

CIVIL ACTION NO. 2:94-0952

Entered: October 16, 1995

DISPOSITION: Summary judgment GRANTED to Plaintiff on the issue of qualified immunity. Summary judgment GRANTED to Defendants on the official capacity claims alleged against them in Plaintiff's state law causes of action. The remainder of the parties' cross motions for summary judgment DENIED.

COUNSEL: For Plaintiff: E. Joseph Buffa, Jr., Kopelman & Associates, Charleston, WV. Roger P. Furey and Michael B. Adlin, Arter & Hadden, Washington, DC.

For Defendants: David P. Cleek, Cleek, Pullin, Knopf & Fowler, Charleston, WV.

JUDGES: Charles H. Haden II, Chief Judge

OPINION BY: Charles H. Haden II

OPINION: MEMORANDUM OPINION AND ORDER

Pending are the parties' cross motions for summary judgment. This matter is now fully briefed and postured for adjudication. The Court hereby GRANTS summary judgment to Plaintiff on the issue of qualified immunity. The Court further GRANTS summary judgment to Defendants on the official capacity claims alleged against them in Plaintiff's state law causes of action. With the exception of these rulings, the Court DENIES the remainder of the parties' cross motions for summary judgment.

## I. FACTUAL BACKGROUND

Plaintiff Better Government Bureau, Inc., (BGB) alleges it is a "watchdog" of government activities with a membership of forty-seven businesses and 304 individuals from various states. BGB commenced operations in August 1993 and asserts it monitors government activities and disseminates information about government policies impacting business. Plaintiff's president, Kenneth Nickalo, summarized the workings of BGB as follows:

> Where appropriate, we express our opinion in various public media and forums on matters of importance to our members and to the business community in general.
>
> . . . .
>
> The BGB has a procedure for its members to follow if they have complaints about the policies or activities of the government, or about the manner in which the member has been treated by the government.

Nickalo aff. ¶¶ 3, 5. BGB derives its income from the dues paid by its members.

In August 1994 a BGB member, Suarez Corporation Industries (SCI), registered a complaint with the BGB arising out of action taken against SCI by the West Virginia Attorney General concerning SCI's advertising practices.[1] Specifically, the Attorney General alleged SCI (1) violated the West Virginia Consumer Credit and Protection Act, West Virginia Code §§ 46A-1-101 et seq., and (2) engaged in fraudulent activities with regard to direct mail marketing practices. SCI requested BGB to investigate its complaint and act accordingly.

BGB undertook preliminary investigative efforts with little apparent success. For instance, Nickalo asserts employees of the Attorney General's office refused BGB's requests under the Freedom of Information Act. Subsequently Plaintiff purchased time with three Charleston area radio stations to broadcast the following announcement on September 8, 1994:

> THIS IS AN IMPORTANT ANNOUNCEMENT
>
> The Better Government Bureau is investigating the actions of Attorney's General Darrell McGraw and Tom Rodd.
>
> Voters already removed McGraw from the State Supreme Court because of his poor performance.
>
> Now we are trying to obtain public information about the Attorney General under the "Freedom of Information Act", but it has been denied. What are McGraw and Rodd trying to hide?

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[1] The president of SCI, Benjamin Suarez, apparently has substantial ties to BGB. SCI contributes $150,000 toward BGB's activities and Mr. Suarez is serving a twenty-five year term on BGB's Board of Trustees. Two other members of the six-member Board are also employed by SCI.

> If you have any information about Darrell McGraw, Tom Rodd or anyone in the Attorney General's office, please contact the Better Government Bureau toll free at 1-800-807-9881.

Nickalo aff. ex. E.

Approximately two weeks later, an article concerning BGB's activities appeared in the Charleston Gazette, a newspaper of general circulation in West Virginia. In part, the article quoted Nickalo as saying "the [BGB] plans to open a Charleston office and possibly start a West Virginia chapter." Nickalo also spoke of plans to lobby the Legislature and said BGB was aligning itself with the Christian Coalition. Nickalo was further reported to have said "'we all have one thing in common: We're sick of the state government of West Virginia . . . . We think we can crack politics in West Virginia, use what we do in West Virginia as a model, and do what we'll do in West Virginia in other states.'" Id. ex. F. The article also spoke of a sharply critical newsletter distributed by BGB concerning Rodd and McGraw.

Consistent with this announcement, Plaintiff took steps to incorporate a West Virginia chapter of its organization under the name "Better Government Bureau, Inc." during the first week of October 1994. As an interim measure, BGB applied to the West Virginia Secretary of State for a certificate of authority to do business as a foreign corporation. That office refused the application, explaining Defendant McGraw had filed articles of incorporation the previous week for a company using the words "Better Government Bureau" as part of its name.[2] BGB later learned

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2. The full corporate name of the entity formed by Defendant McGraw is "Better Government Bureau, Office of the Attorney General, State of West Virginia." The stationary for this entity appends the following language to this name: "a body politic a corporate instrumentality of government with limited agency and quasi-sovereign capacity." Pl's. Mot. for Sum. Jgt. ex. 15.

of events that preceded Defendant McGraw's incorporation of the challenged entity.

On September 30, 1994 Defendant McGraw instructed one of his employees to reserve the name Better Government Bureau with the West Virginia Secretary of State.[3] The employee was informed by a clerk at the Secretary of State's office that anyone attempting to reserve the Better Government Bureau name was first required to see Donald L. Wilkes, Director of the Corporations Division. The employee was then turned away by the clerk due to Wilkes' absence.[4] When the employee returned to the Attorney General's office and informed Defendant McGraw of what transpired, the Attorney General instructed the employee to see Defendant Hechler personally about the matter. When the employee returned to the Secretary of State's office, Defendant Hechler personally escorted her to the Corporations Division. The employee then was permitted to reserve the "Better Government Bureau" name. Later in the day, the employee and Defendant McGraw prepared the necessary filings for the entity and they returned to the

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3. This notion had its genesis in a suggestion by Carol Jackson, a spouse of one of Defendant McGraw's employees, to one of Defendant McGraw's "constituent services" officers. The officer's notes from the conversation state as follows: "Steal name--Form Better Government Bureau before they have a chance to do so." Lila J. Hill dep. at 27. When Ms. Hill reported the constituent's suggestion to Defendant McGraw, the latter admitted he "chuckled inwardly" and was "glad [his] people were being innovative . . . [and] thinking good." Darrell V. McGraw dep. at 99, 101. Defendant McGraw admits he knew his use of the Better Government Bureau name would prevent BGB from "coming into West Virginia, giving birth to a new person and calling it a West Virginia person." Id. at 103. Nevertheless, Defendant McGraw denies he intended to prevent BGB from attacking either him or his office.

4 Wilkes later explained an "administrative flag" had been placed on the words "Better Government Bureau," because Defendant Hechler had an interest in the name.

Secretary of State's office to seek incorporation. Defendant McGraw wrote a personal check to pay the incorporation fee.

On October 4, 1994, Defendant McGraw communicated with fifty-three attorneys general in various states and territories. His letter stated, in part, as follows:

> Please review the enclosed newspaper article, paying particular attention to paragraph 5B and the activities of the Better Government Bureau described therein.
>
> If your office becomes involved in a sweepstakes probe, you will encounter this corporation. To foreclose the possibility of such a corporation operating in your State, you may want to register the name of the Better Government Bureau as an agent for the Attorney General's office with the Secretary of State's Office or take other preventative measures.

Pl's. Mot. for Sum. Jgt. ex. 10.

Defendant McGraw forwarded a similar letter to the same parties on October 6, 1994. The letter alleged an SCI attorney "threatened violence" upon an assistant attorney general, and further read as follows:

> When you come up against these people, you should know that there is a possibility that their modus operandi might include a proclivity to violence.
>
> Please recall my recent letter, in which I recommended that you protect the name Better Government Bureau in your State, otherwise when you act to protect your consumers you will be attacked by a Better Government Bureau for doing so.

Id. ex. 12.

About the same time, Nickalo sent letters to both Defendants Hechler and McGraw seeking elimination of the obstacles BGB was encountering in its attempts to register its name in West Virginia. His efforts met with limited success. Wilkes advised Nickalo the BGB name conflicted with the name chosen by Defendant McGraw and was thus not available for use in West Virginia. Wilkes further advised Nickalo: "consent from the conflicting name holder is necessary to use a confusingly similar name." Nickalo aff. ex. G.[5] Further, Defendant Hechler advised Nickalo as follows: "As I understand you are already conducting business in Charleston, WV[;] you should consult with your attorney." Pl's. Mot. for Sum. Jgt. ex. 13. Plaintiff's continued efforts to obtain permission to do business in West Virginia under the mark "Better Government Bureau, Inc." have met similar obstacles.

The record suggests other possible intimidatory or retaliatory activity by Defendants. The Attorney General's office contacted a BGB member, Imperial Marketing, one of the one hundred plus companies sued by the Attorney General, to discuss settlement. As a precondition to settlement, the Attorney General's office suggested Imperial Marketing discontinue its membership in BGB. Imperial Marketing resigned its membership in BGB, sent a copy of

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[5] It appears Wilkes' concerns were well-founded. The record contains instances of actual confusion of the parties' similar marks. For example, the United States Postal Service delivered mail intended for BGB to the entity incorporated by Defendant McGraw. Rather than forwarding the mail to BGB, an official in Defendant McGraw's office sent the letter to the Postal Service and suggested the Postal Service assist the Attorney General's office in its investigation of Plaintiff's use of the mails.

Further, the Charleston area phone book contains two listings for the Better Government Bureau--one for Plaintiff's entity and one for Defendant McGraw's entity. This has confused directory assistance operators, who occasionally misdirect callers to the wrong entity. An official with Defendant McGraw's office wrote to the phone company and asked Plaintiff's designated name be listed in another fashion because "the likelihood of confusion and injury to the West Virginia Better Government Bureau is great." Pl's. Mot. for Sum. Jgt. ex. 14.

the resignation letter to an official in the Attorney General's office, and requested it be kept confidential. Subsequently the letter was leaked to the Charleston Gazette and BGB alleges its publication has had a chilling effect on BGB's attempts to attract new members in West Virginia.

On October 28, 1994 Plaintiff filed a verified complaint alleging (1) state and federal unfair competition claims and (2) a denial of Plaintiff's right to free speech under both the First Amendment to the United States Constitution and Article III, Sections Seven and Sixteen of the West Virginia Constitution. On November 22, 1994, Plaintiff sought a temporary restraining order and preliminary injunction. The Court denied the requested relief on December 2, 1994. Following discovery, the parties filed the instant cross motions for summary judgment.

## II. THE LAW

### A. Summary Judgment on the Unfair Competition and Constitutional Claims.

The well-settled standard governing the disposition of a motion for summary judgment was recently restated by our Court of Appeals:

> A moving party is entitled to summary judgment 'if the pleading, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to material fact and that the moving party is entitled to judgment as a matter of law.' Fed.R.Civ.Pro. 56(c). See Charbonnages de France v. Smith, 597 F.2d 406 (4th Cir.1979).
>
> A genuine issue exists 'if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.' Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 2510, 91 L. Ed. 2d 202 (1986). In considering a motion for summary judgment, the court is required to view the facts and

> draw reasonable inferences in a light most favorable to the nonmoving party. Id. at 255, 106 S. Ct. at 2514. The plaintiff is entitled to have the credibility of all his evidence presumed. Miller v. Leathers, 913 F.2d 1085, 1087 (4th Cir.1990), cert. denied, 498 U.S. 1109, 111 S. Ct. 1018, 112 L. Ed. 2d 1100 (1991). The party seeking summary judgment has the initial burden to show absence of evidence to support the nonmoving party's case. Celotex Corp. v. Catrett, 477 U.S. 317, 325, 106 S. Ct. 2548, 2554, 91 L. Ed. 2d 265 (1986). The opposing party must demonstrate that a triable issue of fact exists; he may not rest upon mere allegations or denials. Anderson, 477 U.S. at 248, 106 S. Ct. at 2510. A mere scintilla of evidence supporting the case is insufficient. Id.

Shaw v. Stroud, 13 F.3d 791, 798 (4th Cir.), cert. denied, 130 L. Ed. 2d 24, 115 S. Ct. 67, 68 (1994).

On all claims and defenses except qualified immunity and the official capacity state law claims, the Court concludes genuine issues of material fact remain extant.[6]

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[6] In their memorandum in support of summary judgment, Defendants offered a one-page argument asserting the federal unfair competition claim alleged by Plaintiff was not covered under 15 U.S.C. § 1125(a), the applicable statute. Defendants assert Congress intended § 1125(a) to protect consumers from deceptive trade practices. Defendants then argue (1) consumers in West Virginia do not pay for the Attorney General's services; (2) the Attorney General is not engaged in "competition"; and (3) the Attorney General does not profit from the operation of the Bureau it created. In response, Plaintiff cites § 1125(a)(2), which provides "any State, and any such instrumentality, officer, or employee, shall be subject to the provisions of this chapter in the same manner and to the same extent as any nongovernmental entity." Id. BGB asserts Defendant McGraw's use of the confusingly similar name interferes with its efforts (1) to attract and retain dues-paying members; and (2) to act on behalf of its members. Faced with this response, Defendants fail to mention the argument in their reply brief. Defendants also do not appear to assert the argument as a defense to liability in the pretrial order. The Court therefore concludes Defendants have abandoned this particular challenge.

B. Immunity Defenses

1. Introduction

To address the immunity issues asserted by Defendants adequately, the Court should discuss briefly: (1) Plaintiff's causes of action; (2) the Defendants named in those causes of action; and (3) the capacity or capacities in which each Defendant is named. Of particular importance is the capacity in which each Defendant is sued. As a general matter, personal or "individual" capacity suits may affix personal liability on government officials for actions taken under color of state law. Kentucky v. Graham, 473 U.S. 159, 165, 87 L. Ed. 2d 114, 105 S. Ct. 3099 (1985). In contrast, official capacity suits against an officer usually are treated as actions against the governmental entity employing the official. Id.

Plaintiff has named Defendant McGraw in his personal and official capacities and Defendant Hechler in his official capacity under the claims alleging federal and state constitutional violations. Plaintiff seeks prospective injunctive relief against Defendant McGraw in both his personal and official capacities and against Defendant Hechler in his official capacity. Plaintiff also seeks both compensatory and punitive damages against Defendant McGraw in his personal capacity. No constitutional claims are alleged against Defendant Better Government Bureau.

As for the federal unfair competition claim under 15 U.S.C. § 1125(a), Plaintiff has named only Defendants McGraw and Better Government Bureau. As noted by Plaintiff in a conference call with the Court on September 29,

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The Court, however, would note a related issue. Section 1125(a)(1) provides, in pertinent part, the infringing "services" must be used "in commerce." Id. The Lanham Act admittedly accords "in commerce" a broad definition. 29 U.S.C. § 1127. Nevertheless, the definition is not without boundaries. Id. The proof is not sufficiently developed on the breadth and type of activity for which Defendant McGraw intends to use the entity he created. To prevail on this claim Plaintiff must prove Defendants used or will use the mark "in commerce" under § 1125(a).

1995 the capacity in which these two Defendants are sued has been rendered largely meaningless by the 1992 congressional abrogation of Eleventh Amendment immunity for § 1125(a) claims. See infra note 9. These two Defendants may now be sued, regardless of their respective capacities, for a broad array of damages and injunctive relief. Id. Accordingly, the Court will treat each Defendant as being sued in his or its official capacity under § 1125(a).

Plaintiff has named Defendant McGraw in his personal and official capacity and Defendant Better Government Bureau in its "personal corporate capacity" in its state common law unfair competition claims.[7] Plaintiff is somewhat ambivalent as to whether it seeks anything beyond prospective injunctive relief against Defendants McGraw or Better Government Bureau under this cause of action. In one of its briefs, however, Plaintiff claims it "only seeks damages on its personal capacity constitutional claims, and its Lanham Act claims." Mem. in Opp. at 13 (emphasis in original). Accordingly, the Court will proceed to resolve the immunity issues on this representation.

2. Eleventh Amendment Immunity

Defendants assert they are partially immune from defending because of the Eleventh Amendment to the United States Constitution. The Eleventh Amendment provides "the Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."[8] U.S. Const. amend. XI.

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[7] Regardless of the personal capacity label applied to this claim against the challenged entity, the Court concludes the entity is an arm of the state. The Court thus concludes the entity may properly interpose an Eleventh Amendment immunity defense. See infra § II.B.2.

[8] After considerable pre-ratification debate, state representatives were persuaded their thirteen individual sovereigns could not be sued in

In Gray v. Laws, 51 F.3d 426 (4th Cir. 1995), the Court of Appeals restated the well-established parameters of Eleventh Amendment immunity as follows:

> Like the state itself, state officers acting in their official capacity are also entitled to Eleventh Amendment protection, because 'a suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office,' and 'as such, it is no different from a suit against the State itself.'

Id. at 431 (quoting Will v. Michigan Dep't of State Police, 491 U.S. 58, 71, 105 L. Ed. 2d 45, 109 S. Ct. 2304 (1989) (citations omitted)). Gray also noted the equally well-settled and substantial caveat to this general rule: "A state and its officers are not entitled to Eleventh Amendment protection, however, where a plaintiff seeks only prospective, injunctive relief." 51 F.3d at 430 n.1; see also, e.g., Edelman v. Jordan, 415 U.S. 651, 664-68, 39 L. Ed. 2d 662, 94 S. Ct. 1347 (1974). It should be noted, however, the Edelman exception has no application when the state, its officers or instrumentalities are sued for injunctive relief on the basis of state, rather than federal, law. Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89, 106, 117, 121, 79 L. Ed. 2d 67, 104 S. Ct. 900 (1984); Harker v. State Use Industries, 990 F.2d 131, 132 n.1 (4th Cir.), cert. denied, 126 L. Ed. 2d 192, 114 S. Ct. 238 (1993); Westinghouse Elec. v. West Virginia Dep't of Highways, 845 F.2d 468, 469 (4th Cir.), cert. denied, 488 U.S. 855, 102 L. Ed. 2d 116, 109 S. Ct. 143 (1988).

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federal court without consent. 2 Civil Actions Against State and Local Government § 10.1 (John L. Craig et al., 2d ed. 1992). The United States Supreme Court disagreed in Chisholm v. Georgia, 2 U.S. 419, 1 L. Ed. 440 (1793) and held it constitutional for a citizen of one state to sue another state in federal court absent state consent. Chisholm was roundly criticized, and five years later the Eleventh Amendment was ratified to abrogate the unpopular decision. Charles A. Wright, Law of Federal Courts § 48 (5th ed. 1994).

The Edelman exception is clearly applicable to Plaintiff's federal constitutional claims against Defendants McGraw and Hechler.[9] Because Plaintiff seeks only prospective injunctive relief against these Defendants in their official capacities, Eleventh Amendment immunity is inapplicable.

A different result obtains, however, in regard to Plaintiff's official capacity claims against (1) Defendants McGraw and Hechler on the state constitutional claim and (2) Defendant McGraw and the challenged entity on the common law unfair competition claim. Consistent with Pennhurst and its progeny, the Court concludes Defendant Hechler and the challenged entity are immune from suit on these two claims, as they are sued only in their official capacities. Further, to the extent Defendant McGraw is sued in his official capacity on the two claims, he too is entitled to Eleventh Amendment immunity. The personal capacity

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[9] Defendants are not entitled to Eleventh Amendment immunity for Plaintiff's federal unfair competition claims under 15 U.S.C. § 1125(a). Section 1125(a) was amended on October 27, 1992 to provide, in part, as follows:

> As used in this subsection, the term 'any person' includes any State, instrumentality of a State or employee of a State or instrumentality of a State acting in his or her official capacity. Any State, and any such instrumentality, officer, or employee, shall be subject to the provisions of this chapter in the same manner and to the same extent as any nongovernmental entity.

Id. § 1125(a)(2); see also id. § 1122 (stating, inter alia, the remedies available to plaintiffs aggrieved by a state or one of its officers includes injunctive relief, actual damages, profits, costs and attorney's fees "and . . . any other remedies provided" under the Trademark Act).

This amendment to the Trademark Act completely abrogates Eleventh Amendment immunity of states and their officials and instrumentalities. See, e.g., Senate Judic. Comm., S. Rep. No. 280, 102d Cong., 2d Sess. 2 (1992), reprinted in 1992 U.S.C.C.A.N. 3087, 3088 (1993); 3 J. Thomas McCarthy, McCarthy on Trademarks and Unfair Competition § 25.21[2] (3d ed. 1995). Accordingly, both Defendant McGraw and Defendant Better Government Bureau may be subjected to comprehensive legal and equitable remedies under § 1125(a).

claims against Defendant McGraw on the two causes of action are not affected by this analysis, and so remain viable.

3. Qualified Immunity

Only Defendant McGraw is sued personally for damages arising out of the constitutional claims. Defendant McGraw argues he is entitled to qualified immunity for these alleged violations.[10] The Court disagrees.

Qualified immunity is designed "to limit the deleterious effects that the risks of civil liability would otherwise have on the operations of government." Pinder v. Johnson, 54 F.3d 1169, 1173 (4th Cir. 1995) (en banc); see Anderson v. Creighton, 483 U.S. 635, 638, 97 L. Ed. 2d 523, 107 S. Ct. 3034 (1987); Akers v. Caperton, 998 F.2d 220, 225-26 (4th Cir. 1993). The doctrine protects "'all but the plainly incompetent or those who knowingly violate the law . . . .'" Pritchett v. Alford, 973 F.2d 307, 313 (4th Cir. 1992) (quoting Malley v. Briggs, 475 U.S. 335, 341, 89 L. Ed. 2d 271, 106 S. Ct. 1092 (1986)). As stated in Pinder, the defense "prevents officials from being blindsided by liability derived from newly invented rights or new, unforeseen applications of pre-existing rights. In short, officials cannot be held to have violated rights of which they could not have known." Pinder, 54 F.3d at 1173 (emphasis added); see also Davis v. Scherer, 468 U.S. 183, 195, 82 L. Ed. 2d 139, 104 S. Ct. 3012 (1984). As a matter of timing, and in part to achieve the goal of not unnecessarily subjecting public officials to the burdens attendant in civil litigation, the question of qualified

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[10] Defendant McGraw appears to argue he is entitled to qualified immunity for any and all "personal capacity claims" asserted against him. Defs.' Mem. at 16-17. Defendants rightly concede the qualified immunity defense "does not apply to official capacity suits." Id. at 17; see, e.g., Graham, 473 U.S. at 167; Biggs v. Meadows, 66 F.3d 56, 1995 WL 550461, at *4-5 (4th Cir. Sept. 18, 1995). As noted, the only other cause of action for which damages are sought fall under 15 U.S.C. § 1125(a) against Defendants McGraw and Better Government Bureau. Since the Court treats the § 1125(a) claim as an action against the officer and instrumentality named, qualified immunity does not attach.

immunity should be decided "as a threshold matter" in the litigation. See, e.g., Torcasio v. Murray, 57 F.3d 1340, 1352 (4th Cir. 1995) (emphasis in original).

The general contours of the defense are well-defined. In a nutshell, "even officials who violate the Constitution are to be accorded qualified immunity and so escape liability for money damages if, in the performance of discretionary duties, 'their conduct does not violate clearly established . . . constitutional rights of which a reasonable person would have known.'" Buonocore v. Harris, 65 F.3d 347, 353, 1995 WL 536657, at *5 (4th Cir. 1995) (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818, 73 L. Ed. 2d 396, 102 S. Ct. 2727 (1982)); see also Torcasio, 57 F.3d at 1343; Pinder, 54 F.3d at 1173; DiMeglio v. Haines, 45 F.3d 790, 794 (4th Cir. 1995).[11] This inquiry resolves itself into two distinct analytical steps.

First, the Court must decide the purely legal question of whether the challenged actions violated clearly established law. Harlow, 457 U.S. at 818; DiMeglio, 45 F.3d at 794. In making this determination, the Court focuses on the law as it existed at the time of the alleged violation, see, e.g., Buonocore, 65 F.3d 347, 353, 1995 WL 536657, at *5; Torcasio, 57 F.3d at 1343, and "examines the facts alleged by the plaintiff, not those asserted by the defendant." Buonocore, 65 F.3d 347, 357, 1995 WL 536657, at *10 (emphasis in original); DiMeglio, 45 F.3d at 794, 803.[12]

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[11] None of the parties suggest there is any substantive difference between the federal and West Virginia standards for qualified or "good faith" immunity. While the court need not reach the question, it appears the two standards are identical. See, e.g., Syl. Pt. 1, State v. Chase Secs., Inc., 188 W.Va. 356, 424 S.E.2d 591 (1992).

[12] Defendants seem to misapprehend this proposition. For instance, Defendants state as follows in their Memorandum in Support of Summary Judgment: "Admittedly, there is no immunity for fraudulent or malicious acts but here, although these allegations are made, they are not supported by any facts." Id. at 19 (emphasis added).

Second, the Court must determine "whether a reasonable person in the official's position would have known that his conduct would violate" Plaintiff's rights. Torcasio, 57 F.3d at 1343; Pinder, 54 F.3d at 1169.

Perhaps the most difficult task for the Court in ruling on the question of qualified immunity, however, involves the prelude to these two analytical steps: The Court must identify the "'specific right allegedly violated.'" Buonocore, 65 F.3d 347, 353, 1995 WL 536657, at *5 (quoting Pritchett, 973 F.2d 307 at 312); Torcasio, 57 F.3d at 1343. In making this determination, """the proper focus is not upon the right at its most general or abstract level, but at the level of its application to the specific conduct being challenged."'" DiMeglio, 45 F.3d at 803 (quoting Wiley v. Doory, 14 F.3d 993, 995 (4th Cir. 1994) (Powell, J.)) (quoting Pritchett, 973 F.2d at 312). In other words, the specific right asserted must have been "clearly established in a particularized and relevant sense." Pinder, 54 F.3d at 1173 (emphasis added); see DiMeglio, 45 F.3d at 804.

Nevertheless, "it is important not to be overspecific--there need not be a prior case directly on all fours with the facts presented to the official--but 'in light of the pre-existing law the unlawfulness' of [a defendant's] conduct must have been 'apparent.'" 54 F.3d at 1173 (quoting Anderson, 483 U.S. at 640); see DiMeglio, 45 F.3d at 804. One of the Fourth Circuit's most recent qualified immunity decisions illuminates this difficult balancing inquiry:

> Accordingly, [plaintiff] has alleged the violation of a right protected by the Fourth Amendment. We would so hold even if there were no reported opinion directly on point. This is so because there is no requirement that the 'exact right allegedly violated' be previously 'specifically recognized by a court' in order for it [to] be held '"clearly established" for qualified immunity purposes.' Rather, '"clearly established" in this context includes not only specifically adjudicated rights but those manifestly included within more general applications of the core constitutional principle invoked.' The right to

> be free from government officials facilitating a private person's general search of the sort [plaintiff] alleges was conducted here, is 'manifestly included' within 'core' Fourth Amendment protection.'

Buonocore, 65 F.3d 347, 356-357, 1995 WL 536657, at *9 (emphasis added) (citations and footnote omitted); see also Pritchett, 973 F.2d at 314-15.

Accordingly, the Court's first task is to identify the specific right allegedly violated by Defendant McGraw. Defendant McGraw seems to suggest his mere innocent incorporation of a putative state agency using a name similar to that of Plaintiff does not contravene clearly established law. Were this the full extent of Defendant McGraw's alleged conduct, the Court would be inclined to agree. Of course, Plaintiff's allegations, and even some undisputed matters of record, paint a markedly different version of events.

Plaintiff's sequential allegations of retaliatory conduct are quite disturbing. Initially, Plaintiff publicly criticized Defendant McGraw and his office, inter alia, for not releasing information requested pursuant to the Freedom of Information Act. Plaintiff then publicized its plans to start a West Virginia chapter and begin full-scale operations to lobby the West Virginia Legislature because, in part, its members were "sick of the state government of West Virginia."

Within days after these plans were announced, Defendant McGraw acted on a suggestion he "steal" Plaintiff's name so as to thwart or at least hamper Plaintiff's expected attempts to begin wide-scale operations in West Virginia. Defendant McGraw found this suggestion "innovative" and concedes he "chuckled inwardly" at the idea. Defendant McGraw also admits he knew his use of the Better Government name would prevent BGB from "coming into West Virginia, giving birth to a new person and calling it a West Virginia person." As noted earlier in this Opinion, the record reflects Defendant McGraw went to great lengths to preempt Plaintiff's use of the name, thus preventing it from operating in West Virginia as a West Virginia entity. Defendant McGraw personalized these events, tendering his personal check for the entity's incorporation fee.

Next Defendant McGraw sent letters to his fellow attorneys general encouraging them to undertake the same or "other preventative measures . . . to foreclose the possibility of such a corporation operating in [their] State[s]." To underscore the urgency of this appeal, Defendant McGraw sent a second letter to the attorneys general, warning of eventual "attack[s]" by Plaintiff against them. Defendant McGraw conceded the "attack[s]" he was speaking of were, at least in part, Plaintiff's "negative" comments directed at McGraw and his office through the media. See, e.g., McGraw dep. at 43 (stating in regard to Plaintiff's radio announcement "this is a political thing, all right, and it's intended to evoke a negative reaction. And so copy that is used in the political arena to evoke a negative reaction against a public figure is in the business considered to be an attack.").

Perhaps most troubling are the allegations concerning Imperial Marketing. Defendant McGraw's agents influenced Imperial Marketing to discontinue membership in BGB as a condition to settlement of an action the Attorney General had instituted against Imperial. When Imperial agreed to do so, it sent a copy of the resignation letter to the Attorney General's office and asked the letter be kept confidential. Anonymously, the letter was leaked to the press.

Taking Plaintiff's allegations as true, there is an obvious cause and effect relationship. Plaintiff criticized Defendant McGraw and his office, even suggesting Defendant McGraw's performance on the Supreme Court of Appeals of West Virginia was less than stellar. Plaintiff then decided to begin operations in West Virginia and presumably continue engaging in speech critical of Defendant McGraw. In short order, Defendant McGraw retaliated against BGB and attempted to thwart BGB's operational efforts so as to stem the latter's continued criticism of him.

Moulding these facts to the appropriate level of specificity, the issue is whether the law was clearly established at the time of Defendant McGraw's alleged actions that a public official could not engage in retaliatory conduct designed to hamper or thwart a citizen's rights to free speech under the federal and state constitutions. As Judge Posner observed in a recent qualified immunity decision, "to ask the question is pretty much to answer it." Nelson v. Streeter, 16 F.3d 145, 148 (7th Cir. 1994).

The Supreme Court has held "it is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions . . . ." Bridges v. California, 314 U.S. 252, 270, 86 L. Ed. 192, 62 S. Ct. 190 (1941). Additionally, the Court has observed our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." New York Times Co. v. Sullivan, 376 U.S. 254, 270, 11 L. Ed. 2d 686, 84 S. Ct. 710 (1964); see also Korb v. Lehman, 919 F.2d 243, 247 (4th Cir.)(stating "the protection of citizens' right to speak publicly on matters of public concern . . . is at the very heart of the First Amendment."), cert. denied, 502 U.S. 808, 116 L. Ed. 2d 28, 112 S. Ct. 51 (1991).[13]

For the above reasons, governmental officials are prohibited from interfering with, or retaliating against, a citizen's exercise of his or her First Amendment rights. Perry v. Sindermann, 408 U.S. 593, 598, 33 L. Ed. 2d 570, 92 S. Ct. 2694 (1972) (stating "the respondent has alleged that his nonretention was based on his testimony before legislative committees and his other public statements critical of the Regents' policies. And he has alleged that this public

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[13] The fact Plaintiff is not an individual citizen, but rather an association of members, certainly does not lessen the First Amendment protections to which it is entitled. See, e.g., Roberts v. United States Jaycees, 468 U.S. 609, 622, 82 L. Ed. 2d 462, 104 S. Ct. 3244 (1984) (stating "we have long understood as implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends."); Smith v. Arkansas State Highway Employees, 441 U.S. 463, 464, 60 L. Ed. 2d 360, 99 S. Ct. 1826 (1979) (stating "the First Amendment protects the right of an individual to speak freely, to advocate ideas, to associate with others, and to petition his government for redress of grievances. And it protects the right of associations to engage in advocacy on behalf of their members.").

criticism was within the First . . . Amendment['s] protection of freedom of speech. Plainly, these allegations present a bona fide constitutional claim.") (emphasis added); Mt. Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 283-84, 50 L. Ed. 2d 471, 97 S. Ct. 568 (1977) (stating an employee may "establish a claim to reinstatement if the decision not to rehire him was made by reason of his exercise of constitutionally protected First Amendment freedoms."); American Civil Liberties Union v. Wicomico County, 999 F.2d 780, 785 (4th Cir. 1993) (stating "retaliation by a public official for the exercise of a constitutional right is actionable under 42 U.S.C. § 1983, even if the act, when taken for different reasons, would have been proper.").[14]

This principle is not only "clearly established" for qualified immunity purposes, but is also perhaps one of the more well-settled principles of constitutional jurisprudence. See, e.g., Dobosz v. Walsh, 892 F.2d 1135, 1141 (2nd Cir. 1989) (holding "because the proscription of retaliation for a plaintiff's exercise of First Amendment rights has long been established, we conclude [defendant] is not entitled to qualified immunity with respect to [plaintiff's] First Amendment claim.")(citations omitted); Johnston v. City of Houston, 14 F.3d 1056, 1061 (5th Cir. 1994) (dealing with a plaintiff claiming he was arrested in retaliation for exercising his First Amendment rights and the court stating plaintiff "asserted gross infringements of fundamental constitutional protections" that, if proven to be true, demonstrated defendants were "either 'plainly incompetent or knowingly

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[14] The rationale for this rule is obvious: "If the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to 'produce a result which [it] could not command directly.'" Perry, 408 U.S. at 597 (quoting Speiser v. Randall, 357 U.S. 513, 526, 2 L. Ed. 2d 1460, 78 S. Ct. 1332 (1958))(emphasis added).

violated the law.'").[15] Defendant McGraw practically concedes the point by stating "it is true that a person may not be retaliated against or lose some right as a result of retaliation for the exercise of a First Amendment right." Defs.' Mem. in Supp. at 4.

While there was no case directly on point at the time of these actions that would warn-off Defendant McGraw from engaging in such activity, case-specific precedent is not required. Like the Court in Buonocore, this Court concludes the right to engage in purely political speech without fear of retaliatory tactics by a state attorney general is "'manifestly included within more general applications of the core constitutional principle,'" which provides a state official may not burden or otherwise retaliate against a citizen for public criticism of the official's actions. Buonocore, 65 F.3d 347, 357, 1995 WL 536657, at *9. The Court thus concludes Defendant McGraw's actions contravened clearly established law.[16] To rule otherwise would ignore the ad hominem appeal of cornbread and beans.

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[15] Once again, the parties do not suggest the law relating to Plaintiff's claims under Article III, Sections Seven and Sixteen of the West Virginia Constitution is any different or any less clearly established than the federal precedent discussed above. See, e.g., McClung v. Marion County Comm'n, 178 W. Va. 444, 450, 360 S.E.2d 221, 227 (1987); City of Fairmont v. Retail, Wholesale, & Dep't Store Union, 166 W. Va. 1, 9, 283 S.E.2d 589, 593 (1980). Indeed, the Justice McGraw himself stated in City of Fairmont: "In West Virginia the right to protest against the policies of government and the right to seek redress from the government without fear of reprisal are as fundamental to our law and good sense as 'cornbread and beans' are to our diet." City of Fairmont, 166 W. Va. at 20, 283 S.E.2d at 599 (McGraw, J., concurring).

[16] This is precisely the type of case Judge Posner described when he stated "the absence of [many] reported case[s] with similar facts demonstrates nothing more than wide-spread compliance with well-recognized constitutional principles." Eberhardt v. O'Malley, 17 F.3d 1023, 1028 (7th Cir. 1994). The conduct alleged here likely is without

The second step in the qualified immunity analysis is more straightforward. The Court must ascertain whether a reasonable official in Defendant McGraw's position would have known his conduct violated Plaintiff's constitutional rights. The Fourth Circuit in DiMeglio noted:

> Only if a court determines that the plaintiff has alleged a violation of a right clearly established at the time the actions occurred should it proceed to determine whether a reasonable person in the official's position would have known that his actions violated that right. When the inquiry proceeds to this point, 'the immunity defense ordinarily should fail, since a reasonably competent public official should know the law governing his conduct;' however, the defendant may still be able to show 'extraordinary circumstances' and 'prove that he neither knew nor should have known of the relevant legal standard.'

DiMeglio, 45 F.3d at 794-95 n.1 (emphasis added) (citations omitted). Defendant McGraw has failed to demonstrate any extraordinary circumstances to forestall judgment as a matter of law on the existence of qualified immunity. Accordingly, the Court concludes Defendant McGraw knew or should have known his conduct was in violation of Plaintiff's clearly established constitutional rights.

As stated in Pinder, "the linchpin of qualified immunity is objective reasonableness." Pinder, 54 F.3d at 1173; DiMeglio, 45 F.3d at 804 (stating "'objective legal reasonableness' . . . is the touchstone of Harlow [v. Fitzgerald, 457 U.S. 800, 73 L. Ed. 2d 396, 102 S. Ct. 2727 (1982)]."). Taking Plaintiff's allegations as true, Defendant McGraw's actions simply do not pass muster under this standard. The unlawfulness of his conduct should have been apparent to him. Accordingly, the Court concludes as a

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precedent for obvious reasons, and it is doubtful such actions will be repeated in the future.

matter of law Defendant McGraw is not entitled to qualified immunity.[17]

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[17] There is a second reason why Defendant McGraw is not entitled to qualified immunity. His actions were beyond the permissible realm of his discretionary duties and thus outside his scope of authority. Plaintiff complains vigorously of Defendant McGraw's allegedly unauthorized creation of the corporate entity at issue and his usurpation of the Better Government Bureau name in the process. Was the Attorney General authorized to create the challenged entity?

In State ex rel. Fahlgren Martin v. McGraw, 190 W. Va. 306, 438 S.E.2d 338 (1993), the Supreme Court of Appeals of West Virginia had occasion to restate the well-settled scope of the Attorney General's powers. Quoting then Justice McGraw's opinion for the Court in Manchin v. Browning, 170 W. Va. 779, 296 S.E.2d 909 (1982), the Supreme Court observed and held:

> 'By the provisions of our present constitution, the Attorney General is once again an officer of the executive department. However, his return to the executive department did not revive the common law powers of his office. The people of West Virginia specifically expressed their intent that the Attorney General should not exercise those powers by providing that he "shall perform such duties as may be prescribed by law." . . . . The plain effect of the provision is to limit the powers of the Attorney General to those conferred by law laid down pursuant to the constitution. Consequently we conclude that the powers and duties of the Attorney General are specified by the constitution and by rules of law prescribed pursuant thereto.'

Fahlgren Martin, 190 W. Va. at 312, 438 S.E.2d at 344 (quoting Manchin, 170 W. Va. at 785, 296 S.E.2d at 915). After reviewing this analysis, the Supreme Court in Fahlgren Martin concluded the powers of the Attorney General are "limited to what is conferred by law through statute and the Constitution." Id, syl. pt. 1; Syl. Pt. 3, State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc., 461 S.E.2d 516, 523, 1995 WL 425114, at *4 (W. Va. Jul. 19, 1995) (stating "the Attorney General's powers are limited to those specifically conferred by statute.") (emphasis added).

Defendant McGraw cites only West Virginia Code § 46A-7-102 as authorization to create the challenged entity. This statute permits the Attorney General, inter alia, (1) to receive and act on consumer complaints; (2) to counsel persons on their rights and duties under the West Virginia Consumer Credit and Protection Act; and (3) to establish programs for the education of consumers with respect to credit practices and problems. Id. § 46A-7-102(1)(a) to (c). Defendant McGraw reads

## III. CONCLUSION

For the foregoing reasons, the Court hereby GRANTS summary judgment to Plaintiff on the issue of qualified immunity. The Court further GRANTS summary judgment to Defendants on the official capacity claims alleged against them in Plaintiff's state law causes of action. With the exception of these rulings, the Court DENIES the remainder of the parties' cross motions for summary judgment. The Court ORDERS this case to proceed to trial.

The Clerk is directed to send a copy of this Order to counsel of record.

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these sections as necessarily authorizing his creation of corporate persons, as long as such entities are designed at least in part to accommodate these three statutory purposes. The Court disagrees. If the Attorney General could so easily read these three narrow powers into an expansive statutory grant of authority to create a quasi-governmental corporate entity, the constitutional and legislative limits on his powers would soon be vapor and smoke. Given that Defendant McGraw has failed to identify a "specific" legislative enactment authorizing his actions here, the Court concludes he exceeded the scope of his authority as Attorney General of West Virginia.

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF
WEST VIRGINIA,
CHARLESTON DIVISION

BETTER GOVERNMENT BUREAU, INC.,
an Ohio Corporation,

Plaintiff,

vs.

DARRELL V. McGRAW, JR.,
Attorneys General, State of West Virginia,
Personally and in his official capacity;
BETTER GOVERNMENT BUREAU,
Office of the Attorney General,
State of West Virginia, a Body Politic,
A Corporate Instrumentality of Government
with Limited Agency and Quasi-Sovereign
Capacity; and KEN HECHLER,
Secretary of State, in his Official Capacity,

Defendants.

CIVIL ACTION NO. 2:94-0952

Entered: April 25, 1996

DISPOSITION: October 16 Memorandum Opinion and Order REINSTATED and conclusion Defendant McGraw is not entitled to qualified immunity reaffirmed.

COUNSEL: For Plaintiff: E. Joseph Buffa; Kopelman & Associates, Charleston, WV. Roger P. Furey, Michael B. Adlin; Arter & Hadden, Washington, DC.

For Defendants: David P. Cleek; Cleek, Pullin, Knopf & Fowler, Charleston, WV. Michael C. Allen and Barbara H. Allen; Allen & Allen, Charleston, WV.

JUDGES: Charles H. Haden II, Chief Judge

OPINION BY: Charles H. Haden II

OPINION: SUPPLEMENTAL MEMORANDUM OPINION AND ORDER

On October 16, 1995 the Court denied Defendant Darrell V. McGraw's motion for summary judgment on the issue of qualified immunity. Better Gov't Bureau, Inc. v. McGraw, 904 F. Supp. 540, 553 (S.D. W. Va. [1995)].[1] McGraw immediately noticed an interlocutory appeal from that ruling.

While the appeal was pending, Plaintiff Better Government Bureau, Incorporated ("BGB") sought a remand from the Court of Appeals based on two newly discovered memoranda, one of which was given to BGB by Ms. Donna Willis, a former employee of the Attorney General's Office.[2] On February 1, 1996 the Fourth Circuit remanded this case to permit consideration of relief under Rule 60(b), Federal Rules of Civil Procedure and to allow supplemental discovery concerning the memoranda.

This Court then (1) permitted BGB an abbreviated discovery period to develop issues surrounding the two documents and alleged attempts to destroy or conceal them; and (2) temporarily vacated the October 16 Memorandum Opinion. The vacation of the prior Memorandum Opinion was "for the limited purpose of allowing further supplementation of the qualified immunity analysis, if necessary, pending further discovery." Vacation Order at P 4.

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[1] BGB alleges viable personal capacity claims against only Defendant McGraw. McGraw, 904 F. Supp. at 547. The claims against Defendant Hechler and Defendant Better Government Bureau are official capacity claims. Id. at 547-48. Accordingly, McGraw is the only Defendant putatively entitled to interpose a qualified immunity defense. Id. at 549 n.10 ("Defendants rightly concede the qualified immunity defense 'does not apply to official capacity suits.'") (quoted authority omitted).

[2] Since the disclosure, Ms. Willis was terminated by the Attorney General's Office.

## I. DISCUSSION

BGB seeks a substantial factual supplementation of the prior Memorandum Opinion to reflect additional evidence of: (1) Defendants' retaliatory intent; and (2) Defendants' knowledge that they were violating clearly established law. BGB is correct that the evidence uncovered during the supplemental discovery period "provides strong additional support for the Court's qualified immunity analysis." Pl.'s Mem. in Supp. of Supplementation of the Court's Qualified Immunity Analysis at 1 (hereinafter "Pl.'s Mem. in Supp.")

Nevertheless, far-reaching supplementation is unnecessary. Both BGB's and Defendants' assertions regarding the matters uncovered on remand are now part of the record and are available in both the parties' briefs and their designations for the Joint Appendix on appeal. The information is as available to the Court of Appeals as it has been to this Court.

A thorough treatment of the events that led to this lawsuit are contained in the McGraw opinion of October 16, 1995. That in-depth factual development will not be duplicated here, but is incorporated by reference.

As noted previously in McGraw, in determining whether the challenged actions violated clearly established law, "the Court focuses on the law as it existed at the time of the alleged violation and 'examines the facts alleged by the plaintiff, not those asserted by the defendant.'" McGraw, 904 F. Supp. at 549 (citing Buonocore v. Harris, 65 F.3d 347, 353 (4th Cir. 1995); Torcasio v. Murray, 57 F.3d 1340, 1352 (4th Cir. 1995), cert. denied, 116 S. Ct. 772 (1996); and DiMeglio v. Haines, 45 F.3d 790, 794 (4th Cir. 1995)) (citations omitted).

The two memoranda at issue on remand were dated just days prior to McGraw's incorporation of his Better Government Bureau entity. The first memorandum was sent on September 26, 1994 from Assistant Attorney General Daynus Jividen to Defendant Ken Hechler. Jividen testified McGraw personally directed him to send the memorandum, which provides as follows:

> The Attorney General's Office anticipates that an organization called the Better Government Bureau, out of Canton, Ohio, will shortly seek registration, through your office, in order to conduct its alleged business in the State of West Virginia. When the Better Government Bureau attempts registration the Attorney General requests your office to resist and refuse such registration on the grounds that the Better Government Bureau's attempt to ply its business in our state constitutes a fraud and a deceit.
>
> Also, please inform me when the organization's application is received by your office.

Ex. A to Pl.'s Mem. in Supp.[3]

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[3] Defendant McGraw points to State ex rel. McGraw v. Imperial Marketing, 1996 W. Va. LEXIS 27, No. 22809 (W. Va. Mar. 20, 1996), a decision issued nearly two years after the conduct alleged in this case, to support his proposition that he viewed BGB as a fraud and a "deceit." In Imperial, the Supreme Court of Appeals upheld the issuance of a preliminary injunction against Suarez Corporation Industries (SCI) arising out of the lower court's finding that there was "reasonable cause" to believe that SCI was engaging in or likely to engage in conduct in violation of the West Virginia Prizes and Gifts Act, West Virginia Code § 46A-6D-1 to -10. Id. at 1. The West Virginia Court left no doubt where it stood on SCI's nefarious practices: "SCI's sweepstakes are nothing more than ingeniously crafted deceptive methods to sell its merchandise by deluding consumers with expectations of greater rewards if they purchase the product that is the subject of the solicitation." Id. at 20-21. Further, the West Virginia Court was not particularly complimentary of a principal of SCI, Benjamin Suarez. Id. at 26. As noted in the prior Memorandum Opinion, this Court is well aware of Mr. Suarez's significant links to BGB. McGraw, 904 F. Supp. at 544 n.1.

There are at least two troubling considerations relating to Defendant McGraw's fraud and deceit argument. While there is evidence McGraw was pursuing and investigating SCI, there is a decided lack of any indication that McGraw investigated equally BGB's activities and underpinnings. While McGraw alluded to some sort of pre-memorandum investigation into BGB's background, he is woefully short on specifics. Further, while Hechler's memorandum requested that Jividen "spell out in writing the fraud and deceit to which [Jividen] referred in [the] September 26 memorandum[,]" the follow-up information was never received from either Jividen or Defendant McGraw.

The United States Supreme Court, in a case dealing with the First Amendment rights of public employees, suggested recently that before a government employer can discharge an employee for unprotected speech, it must first perform a reasonable investigation to determine what the speech was and believe in good faith the facts on which it purports to act. Waters v. Churchill, 128 L. Ed. 2d 686, 114 S. Ct. 1878, 1889-90 (1994) (plurality opinion). Although Waters was a plurality decision, Justice Souter observed in concurrence that the Majority accepted the "reasonable investigation" requirement. Id. at 1893. The same requirement is even more compelling in this analogous case because the government, when acting as an employer, is given "a freer hand in regulating the speech of its employees than it has in regulating the speech of the public at large." Id. at 1886. The record here leads one to infer the necessary reasonable investigation and good faith are not demonstrable.

Second, assuming Defendant McGraw can prove his fraud and deceit allegations at trial, that alone may not carry the day. Where SCI's speech is clearly characterized as commercial in nature, the same cannot as easily be said in reference to the purely political speech engaged in by BGB. The alleged conduct here is more analogous to the situation addressed last term in McIntyre v. Ohio Elections Comm'n, 131 L. Ed. 2d 426, 115 S. Ct. 1511 (1995). In McIntyre, the Ohio Supreme Court upheld the constitutionality of an Ohio statutory prohibition against distribution of anonymous campaign literature. The court justified its conclusion, in part, on the ground that the "law served to identify those who engage in fraud, libel or false advertising." McIntyre v. Ohio Elections Comm'n, 67 Ohio St. 3d 391, 618 N.E.2d 152, 155-56 (1993). The Supreme Court reversed and stated as follows:

> But political speech by its nature will sometimes have unpalatable consequences, and, in general, our society accords greater weight to the value of free speech than to the dangers of its misuse. Ohio has not shown that its interest in preventing the misuse of anonymous election-related speech justifies a prohibition of all uses of that speech. The State may, and does, punish fraud directly. But it cannot seek to punish fraud indirectly by indiscriminately outlawing a category of speech, based on its content, with no necessary relationship to the danger sought to be prevented.

McIntyre, 115 S. Ct. at 1524 (emphasis added) (citations omitted). Taking BGB's allegations as true, Defendant McGraw did not initially undertake the direct route of thoroughly investigating BGB and seeking injunctive relief under the West Virginia Consumer Credit and Protection Act or other appropriate consumer protection legislation when or if he discovered potential fraud. Rather, he attempted to punish BGB indirectly by cutting off BGB's critical speech at its root and preempting BGB's use of its name in this State. What Defendant McGraw allegedly

Defendant Hechler testified he was "a little bit surprised" by the "resist and refuse" [*727] request. Hechler dep. at 16. His response, dated September 27, 1994, set forth in pertinent part below, reveals his concerns:

> In response to your memorandum of September 26, and after personal discussion with the Attorney General, I will be pleased to inform you when the Better Government Bureau actually attempts to register with the Secretary of State's office. The issue of resisting and refusing such registration is more complicated that [sic] I at first imagined.
>
> I do not recall any instance when any organization has been denied registration because of its political activity. You [sic] memorandum refers to the BGB's 'attempt to ply its business in our state constitutes a fraud and a deceit.' Without passing judgment as to whether this would constitute sufficient grounds for resisting and refusing registration, I would ask that you spell out in writing the fraud and deceit to which you refer in your September 26 memorandum.
>
> I look forward to working with you on this issue, with the understanding that when an organization is in good standing in our neighboring state of Ohio, that makes it very difficult to deny registration in West Virginia. However, I will be pleased after receiving your response to this memorandum to consider this issue further within the confines of the law which governs our corporate chartering.

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did, to borrow from a colloquial description of the overbreadth doctrine, was to impermissibly "'burn the house to roast the pig[.]'" West Virginia Pride, Inc. v. Wood County, 811 F. Supp. 1142, 1147-48 n.5 (S.D. W. Va. 1993) (quoting Butler v. Michigan, 352 U.S. 380, 383, 1 L. Ed. 2d 412, 77 S. Ct. 524 (1957)).

Id. at Ex. B. (emphasis added).

First, the thrust of BGB's allegations are that McGraw attempted to block BGB's efforts to do business in West Virginia in retaliation for the latter's negative comments about McGraw and his staff in the Charleston media.[4] The probative value of these memoranda in proving BGB's allegations is obvious. It is worth noting that the Jividen memo made no direct or even indirect reference to BGB's political activity as a basis for denying registration. Further, Jividen testified his only communication with Defendant Hechler regarding BGB in September 1994 was the memorandum he sent on September 26. That leads one to reasonably conclude it was McGraw who raised the "political activity" specter with Defendant Hechler during the "personal discussion" between the two. This is buttressed by Defendant Hechler's statement in the memorandum that "the issue of resisting and refusing [BGB's] registration is more complicated that [sic] I at first imagined[,]" thus indicating

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[4] Defendant McGraw himself, as the Court noted previously, did not simply let BGB's criticism roll off his back. Rather, he took it as a personal attack:

> Defendant McGraw conceded the 'attack[s]' [by BGB] he was speaking of [in a letter to his fellow attorneys general] were, at least in part, [BGB's] 'negative' comments directed at McGraw and his office through the media. See, e.g., McGraw dep. at 43 (stating in regard to [BGB's] radio announcement 'this is a political thing, all right, and it's intended to evoke a negative reaction. And so copy that is used in the political arena to evoke a negative reaction against a public figure is in the business considered to be an attack.").

McGraw, 904 F. Supp. at 551. He also suggested in his deposition during the supplemental discovery period that BGB's statements directed at him and members of his office constituted an "obstruction of justice" merely because the statements were "intended to modify the behavior of public officials." McGraw dep. at 58.

he had prior discussions with someone on the matter. Ex. B to Pl.'s Mem. in Supp. (emphasis added). Defendants deny this occurred.[5]

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[5] "Deny" is perhaps too strong a word. Defendant McGraw corrected BGB's counsel and suggested that while he (McGraw) would not rule out the possibility that he had a discussion with Defendant Hechler about BGB's political activity, he "didn't remember" such a conversation. McGraw dep. at 54. Defendant Hechler at first categorically suggested his "personal discussion" with McGraw simply related to (1) Hechler's willingness to tell McGraw when BGB attempted to register to do business in West Virginia and not (2) BGB's political activity or the request to deny or resist registration. This categorical assertion was later qualified by Hechler:

> Well, obviously documents as you know help a person to get clearer recollection of what occurred. And independent recollection is hard to separate from what you have down in black and white because this was a very, very small blip on my radar, on my radar screen actually since my office handles not only a huge number of transactions but is involved in elections and charities and a multiplicity of other activities.
>
> I know this is important to you and your client, but, yet, to me it was a very small matter. So when you ask the question of whether or not I have independent recollection of a conversation, I'm trying to recollect as clearly as I can things that happened a year and a half ago. And that's my clear recollection which is enforced, reinforced by what the document says.

Hechler dep. at 9. Further, with admirable and refreshing candor atypical to this case, Defendant Hechler later admits both he and Defendant McGraw's discussions did indeed go a bit further:

> Q Did you ever have any discussions with Mr. McGraw regarding why he wanted to take any efforts to resist the Better Government Bureau's efforts to register with your office?
>
> A The only discussion that we had concerned the type of activity which the Better Government Bureau was directing at Tom Rodd [an official in Defendant McGraw's office] to try to smear him as a felon. And as I think I previously indicated, I had some sympathy with that since I personally had been opposed to the war in Vietnam myself. And that was the-- That was the major discussion and the discussion which we

In sum, taking BGB's allegations as true for determining whether a violation of clearly established law occurred, the memoranda give rise to a strong inference that (1) McGraw discussed halting BGB's attempts to register to do business in West Virginia with Defendant Hechler; and (2) McGraw's actions were aimed at burdening the political speech BGB aimed at McGraw and his staff. There is a substantial indication someone implicitly or explicitly broached the subject of BGB's political activity as a basis for denying registration, and that motive was not lost on Defendant Hechler according to his response memorandum.

Second, the alleged innocent non-production of the Jividen memorandum during discovery is very difficult for the Court to credit when one considers the timing of these events. Again, one must remember the memorandum was drafted on September 26, 1994 allegedly just moments after Jividen met with McGraw and another member of the Attorney General's office, and a copy was sent to McGraw. BGB's lawsuit, with the core allegations that Defendants attempted to block BGB's efforts to do business in West Virginia in retaliation for the latter's negative comments about McGraw and his staff, was filed just one month later. Nevertheless, the Jividen memorandum was not produced in the months of discovery that followed shortly after the memorandum was prepared. BGB observed "it is simply incredible that all of these witnesses overlooked or forgot a

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> had other than the issue of, 'If the Better Government Bureau attempts to register, would you let me know.'. . .
>
> . . . .
>
> Q In your discussion with Mr. McGraw in which you talked about the Thomas Rodd situation, did Mr. McGraw indicate that because of the way the plaintiff had referred to Mr. Rodd in the press that he wanted to block the registration of that company in West Virginia?
>
> A No, that issue never arose during our conversation. He was simply indicating his strong protective feelings protecting Mr. Rodd against the kind of things that were being said about him in the rally that was apparently held in Washington, D.C.

Id. at 11-13.

memo in which McGraw attempted to block BGB's efforts to register to do business four weeks before BGB sued McGraw for allegedly interfering with BGB's efforts to do business." Pl.'s Mem. in Supp. at 5-6. As conceded by Jividen to Hechler after BGB's untimely discovery of the memorandum, explaining the timing of these events and the nondisclosure have turned out to indeed be a "'rocky road'" for Defendants. Hechler dep. at 50.

## II. CONCLUSION

In their reply brief in support of summary judgment filed nearly one year ago, Defendants asserted as to McGraw's motives for choosing the name for his entity and incorporating it:

> The evidence demonstrates that Judge McGraw had long contemplated creating a government agency to be an advocate for consumer programs and to provide tools for consumer education. (McGraw, D. 78) He chose 'Better Government Bureau' because he liked its 'ring' and felt it was an appropriate name for an agency such as he had contemplated. Id. Thus, defendants have established a legitimate, non-retaliatory motive for its [sic] conduct.

Defs.' Reply to Pl's. Oppos. to Defs.' Mot. for Summ. Jgt. at 2 (emphasis added).

While the jury ultimately will have to determine McGraw's motives for incorporating the challenged entity, his putatively innocent motive does not "ring" true in light of either the subject of this ruling or that contained in the prior Memorandum Opinion.

Accordingly, the Court REINSTATES its October 16 Memorandum Opinion and Order and reaffirms its conclusion Defendant McGraw is not entitled to qualified immunity.

The Clerk is directed to send a copy of this Supplemental Memorandum Opinion and Order to counsel of record.

**PUBLISHED**
**UNITED STATES COURT OF APPEALS**
**FOR THE FOURTH CIRCUIT**

No. 96-1464

In Re: BARBARA H. ALLEN,

Appellant,

BETTER GOVERNMENT BUREAU, INCORPORATED, an Ohio Corporation,

Plaintiff-Appellee,

v.

DARRELL V. MCGRAW, JR., Attorney General,
State of West Virginia, Personally and
in his Official Capacity;
BETTER GOVERNMENT BUREAU OFFICE
OF THE ATTORNEY GENERAL STATE OF
WEST VIRGINIA, A Body Politic,
A Corporate Instrumentality of Government
with Limited Agency and Quasi-Sovereign Capacity;
KEN HECHLER, Secretary of State, in his Official Capacity,

Defendants,

v.

DONNA WILLIS,

Party in Interest.

BETTER GOVERNMENT BUREAU, INCORPORATED,
an Ohio Corporation,

Plaintiff-Appellee,

v.

DARRELL V. MCGRAW, JR., Attorney
General, State of West Virginia,
Personally and in his Official
Capacity,

Defendant-Appellant,

and

BETTER GOVERNMENT BUREAU

No. 96-1601

OFFICE OF THE ATTORNEY GENERAL STATE OF WEST VIRGINIA, A Body Politic,
A Corporate Instrumentality of Government with Limited Agency and Quasi-Sovereign Capacity;
KEN HECHLER, Secretary of State, in his Official Capacity,

Defendants,

v.

BARBARA H. ALLEN; DONNA WILLIS,

Parties in Interest.

BETTER GOVERNMENT BUREAU, INCORPORATED,
an Ohio Corporation,

Plaintiff-Appellee,

v.

DARRELL V. MCGRAW, JR., Attorney
General, State of West Virginia,
Personally and in his Official
Capacity,

Defendant-Appellant,

and

BETTER GOVERNMENT BUREAU

No. 96-1652

OFFICE OF THE ATTORNEY GENERAL STATE OF
WEST VIRGINIA, A Body Politic,
A Corporate Instrumentality of Government with Limited
Agency and Quasi-Sovereign Capacity;
KEN HECHLER, Secretary of State, in his Official Capacity,

Defendants,

v.

BARBARA H. ALLEN; DONNA WILLIS,

Parties in Interest.

Entered: July 16, 1997

**ORDER**

A member of the Court requested a poll on the suggestion for rehearing en banc. The poll failed to produce a

majority of the judges in active service in favor of rehearing en banc.

Chief Judge Wilkinson, and Judges Russell, Widener, Wilkins, Luttig, and Williams voted for rehearing en banc. Judges Murnaghan, Ervin, Niemeyer, Hamilton, Michael, and Motz voted against rehearing en banc. Judge Hall disqualified himself and took no part in the consideration of this case.

Judge Motz filed an opinion concurring in the denial of rehearing en banc, in which Judges Murnaghan, Ervin, Hamilton, and Michael joined. Judge Luttig filed an opinion dissenting from the denial of rehearing en banc, in which Chief Judge Wilkinson, and Judges Russell, Widener, Wilkins, and Williams joined.

The suggestion for rehearing en banc is hereby denied. Entered at the direction of Judge Motz for the Court.

DIANA GRIBBON MOTZ, Circuit Judge, concurring in the denial of rehearing en banc:

When a government employee acts within the scope of his authority in an objectively reasonable manner, the qualified immunity doctrine shields his conduct from scrutiny in a § 1983 damages action. Anderson v. Creighton, 483 U.S. 635 (1987); Harlow v. Fitzgerald, 457 U.S. 800 (1982). In these circumstances qualified immunity not only insulates an official from liability, but also entitles him to escape trial. Mitchell v. Forsyth, 472 U.S. 511, 526 (1985). This court's unanimous holding in the case at hand -- that a government employee who performs acts "clearly established to be beyond the scope of his discretionary authority" cannot claim qualified immunity -- completely accords with these principles. See In re Allen, 106 F.3d 582, 593 (4th Cir. 1996).

Indeed, although Attorney General McGraw petitioned for rehear ing, urging that we follow McElveen v. County of Prince William, 725 F.2d 954 (4th Cir. 1984), and apply subjective factors to evaluate whether an official is entitled to qualified immunity, McGraw himself expressly conceded that our formulation of the "test for determining whether qualified

immunity applies" in this case "is consistent with this Court's decisions in a number of cases and is supported by the Supreme Court's decision in Anderson v. Creighton." McGraw's concession was well advised. Our holding not only accords with Fourth Circuit precedent, Allen, 106 F.3d at 593-94, and that of every other court to consider the question, Id. at 590, but also, and most impor tantly, with controlling Supreme Court authority. Id. at 591-93.

Our dissenting colleagues, however, would grant rehearing on a basis never suggested by McGraw or adopted by any court. They would extend the powerful protection afforded by the qualified immunity doctrine to employees committing acts clearly established to be beyond the scope of official duties. Such a holding would be contrary to the purposes of the qualified immunity doctrine, undermine its validity, and conflict with Supreme Court directives as to when the doctrine is applicable. Such a holding would be both unprecedented and unwise.

The court's opinion in this case sets forth my position; I write here only to respond to the call for rehearing.

I.

Our dissenting colleagues vociferously assert that the court's opinion is contrary to controlling Supreme Court precedent. To the contrary, our holding is entirely consistent with, in fact compelled by, Supreme Court precedent.

At common law an official's immunity was limited to acts within the scope of his authority, see Allen, 106 F.3d at 591-92, and long before the Harlow Court created modern qualified immunity "the decisions h[ad], indeed, always imposed as a limitation upon [official] immunity that the official's act must have been within the scope of his powers." Barr v. Mateo, 360 U.S. 564, 572 (1959) (quoting Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949)) (plurality opinion) (internal citations omitted). The Supreme Court followed this

unbroken line of precedent in applying qualified immunity under § 1983. See, e.g., Procunier v. Navarette, 434 U.S. 555, 561-62 (1978) (holding § 1983 immunity dependent upon "the scope of discretion and responsibilities of the office"); Wood v. Strickland, 420 U.S. 308, 318 (1975) (same). That approach is the only one consistent with the Court's long held view, first expressed in absolute immunity cases, that "the relation of the act complained of to matters committed by law to [the official's] control or supervision . . . must provide the guide in delineating the scope of the rule which clothes the official acts of the executive officer with immunity." Scheuer v. Rhodes, 416 U.S. 232, 247 (1974) (quoting Barr, 360 U.S. at 573-74 (1959)) (quotation marks omitted). See also Butz v. Economou, 438 U.S. 478, 495 (1978) (official immunity does not abolish the liability of officers "for actions manifestly beyond their line of duty.").

Harlow did not signal a break with this long held understanding of official immunity. In Harlow and its progeny, the Supreme Court reiterated that a government official may claim qualified immunity only when "an official's duties legitimately require action in which clearly established rights are not implicated." Harlow, 457 U.S. at 819 (emphasis added); Mitchell, 472 U.S. at 525; see also Anderson, 483 U.S. at 639 ("whether an official protected by qualified immunity may be held personally liable for an allegedly unlawful official action generally turns on the `objective legal reasonableness' of the action.") (emphasis added); Id. at 640 (discussing when clearly established law protects "an official action.").

Furthermore, the policies that underlie Harlow support following the traditional scope of authority rule. In formulating the modern, objectively reasonable, qualified immunity doctrine, the Supreme Court recognized it was resolving the "balance between the evils inevitable in any available alternative." Harlow, 457 U.S. at 813-14. See also Wyatt v. Cole, 504 U.S. 158, 168 (1992); Anderson, 483 U.S. at 638. On the one hand, in "situations of abuse of office, an action for

damages may offer the only realistic avenue for vindication of constitutional guarantees;" on the other, the costs of such suits are great to the defendant officials and "society as a whole." Harlow, 457 U.S. at 814. For these reasons, the Court made it clear that it was providing qualified immunity to government employees because of their public office and reserving the immunity for performance of official duties.

Thus the Court explained that governmental employees are accorded qualified immunity from the consequences of objectively reasonable official acts to prevent "the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office" and "the danger that the fear of being sued will `dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties.'" Harlow, 457 U.S. at 814 (quoting Gregoire, 177 F.2d at 581) (bracketed material supplied by Harlow Court) (emphasis added). See also Wyatt, 504 U.S. at 168; Mitchell, 472 U.S. at 526.

But, this "principal rationale for affording certain public servants immunity from suits for money damages arising out of their official acts is inapplicable to unofficial conduct." Clinton v. Jones, No. 95-1853, 1997 WL 273679, at *7 (U.S. May 27, 1997) (emphasis added) (holding in § 1983 action no absolute immunity for damages arising from "unofficial conduct"). Thus, as the Supreme Court reaffirmed only a few days ago, the Court has "never suggested that the President, or any other official, has an immunity that extends beyond the scope of any action taken in an official capacity." Id. at *8 (emphasis added). By definition, government officials acting beyond the scope of their authority are not engaged in the "duties" of "public office," involving "public issues." Harlow, 457 U.S. at 814. They are instead acting outside the scope of any duty of public office, and thus neither the "principal rationale" for official immunity nor the immunity itself shields them. Clinton, 1997 WL 273679, at *7.

When a government employee's acts are clearly established to be beyond the scope of his official duties, obviously his acts are not "legitimately require[d]" by those duties as Harlow directs. Harlow, 457 U.S. at 819. The dissenters' extension of qualified immunity to those acts would totally undermine the careful test that the Supreme Court formulated in Harlow in light of and consistent with its decisions in Barr, Scheuer, Wood, Procunier, and Butz, and which it has reiterated in Clinton, Wyatt, Anderson, and Mitchell.

II.

The dissenters' unwarranted extension of qualified immunity to acts clearly established to be beyond the scope of official duties also finds no support in the procedure the Supreme Court has mandated for determining whether an official can claim such immunity.

The Supreme Court has crafted a two-step process for determining whether an official may claim immunity: 1) was an official in similar circumstances granted a common law immunity at the time of passage of § 1983; 2) do the purpose and history of § 1983 or Harlow's special policy considerations require providing immunity. Wyatt, 504 U.S. at 163-64 (cited and quoted in Allen, 106 F.3d at 590-92); id. at 175-76 (Rehnquist, C.J., dissenting); Malley v. Briggs, 475 U.S. 335, 339-340 (1986). In fashioning our opinion, we closely followed this approach; the dissenters attempt to ignore it.

First, after examining Blackstone's Commentaries and four nineteenth century Supreme Court cases, we concluded, as the Supreme Court did in Butz, 438 U.S. at 489-90, that at common law government officials received no immunity for actions that were beyond the scope of their authority. See Allen, 106 F.3d at 591-592.* We proceeded to find that nothing in "the history and purpose of § 1983 . . .suggests that Congress intended government officials acting clearly beyond

the scope of their authority to be immune from suits for money damages." Id. at 592. Tellingly, the dissent does not dispute this conclusion.

We then considered "the special policy concerns involved in suing public officials." Id. at 592-93. We concluded that these policy concerns -- preservation of government officials' "ability to serve the public good or to ensure that talented candidates [are] not deterred by the threat of damages from entering public service," Wyatt, 504 U.S. at 167 -- are not implicated when an official acts totally beyond the bounds of his authority. See Clinton, 1997 WL 273679, at *8 ("This reasoning provides no support for an immunity for unofficial conduct.").

Although the dissent suggests certain "horribles" assertedly sure to arise from our holding, it never confronts the fundamental difficulty with its own approach, which would shield an official from suit who knew or should have known that he was acting well beyond the bounds of his authority. To hold as the dissent suggests would award public employees more protection than they were allowed at common law, and expand Harlow to public employees who violate the public trust by acting far beyond the permissible scope of their responsibilities. Such a holding would not benefit the government, or the public, and could only serve a government official's private interests. Yet, the Supreme Court has specifically directed that qualified immunity is meant to "safeguard government, and thereby protect the public at large, not to benefit its agents." Wyatt, 504 U.S. at 168 (emphasis added).

Moreover, an extension of the qualified immunity doctrine in the manner the dissent suggests, i.e. to benefit an official's private interests, is totally unnecessary in view of our careful formulation of a standard that preserves great leeway to government employees for the aggressive performance of their official duties. Allen, 106 F.3d at 592-94. Thus, "an official may claim qualified immunity as long as his actions are not

clearly established to be beyond the boundaries of his discretionary authority." Id. at 593 (emphasis added). Only if an employee acts in a way plainly beyond the outer perimeter of his official duties does he lose the right to claim immunity from suit. This standard provides officials with far more protection than the standard adopted by every other court that has considered the question. All of those courts have held that officials cannot claim qualified immunity for any acts beyond the scope of their authority. See, e.g., Schechter v. Comptroller of New York, 79 F.3d 265, 268-70 (2d Cir. 1996); Lenz v. Winburn, 51 F.3d 1540, 1545-47 (11th Cir. 1995); Merritt v. Mackey, 827 F.2d 1368, 1373 (9th Cir. 1987).

The principal "horrible" raised by the dissent-- that even our quite narrow holding will require federal courts to perform cumbersome inquiries into state law -- is thus belied by the experience of our sister circuits. Not a single court that has held that officials acting beyond the scope of their authority cannot claim qualified immunity has suggested that this inquiry (far broader than the one we mandated) is overly burdensome. See, e.g., Schechter, 79 F.3d at 268-70; Lenz, 51 F.3d at 1545-47; Merritt, 827 F.2d at 1373. See also Mackey v. Dyke, 29 F.3d 1086, 1095 (6th Cir. 1994) ("defendants bear the initial burden of coming forward with facts to show they were acting within their discretionary authority at the time in question."); Rheaume v. Texas Dept. of Public Safety, 666 F.2d 925, 930 (5th Cir. 1982) (An officer may not claim qualified immunity unless he"has shown that he was acting in his official capacity and within the scope of authority.").

In fact, federal courts are well equipped to examine state law to answer a federal question; even the dissenters recognize that federal courts frequently must interpret state law in § 1983 actions. Federal courts have regularly made an identical scope of authority inquiry in cases of absolute immunity, where "the scope of immunity has always been tied to the `scope of . . . authority.'" Doe v. McMillan, 412 U.S. 306, 320 (1973) (quoting Wheeldin v. Wheeler, 373 U.S. 647,

651 (1963)); see also Westfall v. Erwin, 484 U.S. 292, 297-98 (1987). Furthermore, in the vast majority of cases a defendant official's conduct "relates to, or flows from, conduct that the official is indeed authorized to commit" and so he will easily meet his scope of authority burden in the first pleading raising qualified immunity. Allen, 106 F.3d at 594.

In sum, the court correctly concluded that an official acting well beyond the scope of his authority may not claim qualified immunityunder the Supreme Court's "well stablished" approach "to questions of immunity under § 1983." Malley, 475 U.S. at 339. An official who acted beyond his discretionary authority had no immunity from suit at common law. Allen, 106 F.3d at 591-92. There is nothing in the history or purposes of § 1983 to suggest "that Congress meant to enlarge common law immunities to include officials acting outside the scope of their authority," and the "special policy concerns involved in suing public officials" are entirely consistent with our decision in this case. Id. at 592-94.

III.

Before concluding, I must briefly address the dissent's fundamental error in urging that Davis v. Scherer, 468 U.S. 183 (1984), controls the case at hand.

The Supreme Court has expressly held that Davis concerned a single "entirely discrete question: Is qualified immunity defeated where a defendant violates any clearly established duty, including one under state law, or must the clearly established right be the federal right on which the claim for relief is based? The Court held the latter." Elder v. Holloway, 510 U.S. 510, 515 (1994) (citing Davis, 468 U.S. at 193-96 & n. 14) (emphasis in original). Therefore, the sole "discrete" question answered in Davis is whether a defendant official's properly asserted claim of qualified immunity may be "defeated" or "overcome" because the official has violated some other statute or regulation. Id. at 514-15 (quoting Davis,

468 U.S. at 197). Davis does not address, let alone decide, whether a government employee, who commits acts clearly established to be beyond the scope of his official authority, may claim qualified immunity in the first instance.

Thus, the case at hand deals with an entirely different question than that presented in Davis. In this respect, this case is far closer to Wyatt v. Cole, 504 U.S. 158 (1992), than Davis. In Wyatt, decided eight years after Davis, the Supreme Court addressed the question of whether private parties could, in the first instance, claim qualified immunity, not whether a violation of clearly established law defeated that immunity. The Wyatt Court did not find that Davis prohibited this initial inquiry or was even relevant to it. Indeed, just as the parties in the case at hand have never suggested that Davis was relevant to the scope of authority question, the Wyatt Court never cited Davis.

Yet the Court in Wyatt, after following the "well established" approach to determine whether a defendant can claim immunity, concluded that qualified immunity was not "available for private defendants faced with § 1983 liability for invoking a state replevin . . .statute." Wyatt, 504 U.S. at 168-69 (emphasis added). Here we have followed precisely the same "well established" approach and have similarly concluded that qualified immunity is not available to a government employee engaging in acts clearly established to be beyond the scope of his official duties.

Furthermore, contrary to the suggestion of the dissent, whether an official has violated state law does not control the scope of authority inquiry. See Allen, 106 F.3d at 594-95. Instead, the analysis focuses solely on the quite different inquiry of whether a government employee's acts clearly fall beyond the outer limit of his official authority. Id.

Accordingly, neither Wyatt nor the case at hand concern the only question addressed in Davis: "[i]s qualified immunity defeated where a defendant violates any clearly established [state law] duty." Elder, 510 U.S. at 515 (first

emphasis added). The Davis plaintiff, unlike the Better Government Bureau ("BGB") or the plaintiff in Wyatt, made no claim that the defendants were not entitled to immunity at all. The Davis plaintiff did not argue that under the common law a defendant official had no immunity for acts that "violat[ed] some other statute or regulation." Davis, 468 U.S. at 194 n. 12 (emphasis in original). This is because no such common law rule exists. Therefore, in Davis the plaintiff, unlike BGB or the Wyatt plaintiffs, was not asking the Court to recognize that at common law in 1871 (when § 1983 was enacted) no immunity existed, and thus no immunity should exist today. Instead, the Davis plaintiff was asking the Court to shrink the immunity recognized at the time of passage of § 1983 as a policy matter.

If the Davis Court had accepted the plaintiff's position, officials that violated a state regulation would have had less immunity protection than the common law afforded at the time of § 1983's passage. Thus, the Davis Court's rejection of that position was well founded. In contrast, here and in Wyatt, the defendant asks for an immunity he would not have been granted at common law. As noted within, the Supreme Court has eschewed providing immunity in such circumstances unless compelling special policy concerns require such a holding. But just as no compelling policy concern requires a court to afford qualified immunity to private parties "faced with § 1983 liability for invoking a state replevin . . . statute," Wyatt, 504 U.S. at 168-69, no compelling policy reason requires that qualified immunity be afforded government employees who have acted in a way clearly established to be beyond the scope of their official duties.

IV.

The dissent suggests an unprincipled departure from the Supreme Court's long held understanding of official immunity and § 1983. Justice Kennedy, joined by Justice

Scalia, concurring in Wyatt warned that such departures are not to be undertaken lightly:

> It must be remembered that unlike the common-law judges whose doctrines we adopt, we are devising limitations to a remedial statute, enacted by Congress, which "on its face does not provide for any immunities." Malley, supra, 475 U.S. at 342, 106 S.Ct. at 1096-97 (emphasis in original). We have imported common-law doctrines in the past because of our conclusion that the Congress which enacted § 1983 acted in light of existing legal principles. Owen v. City of Independence, 445 U.S. 622, 637-638, 100 S.Ct. 1398, 1408-09, 63 L.Ed.2d 673 (1980). That suggests, however, that we may not transform what existed at common law based on our notions of policy or efficiency.

Wyatt, 504 U.S. at 171-72 (Kennedy, J. concurring) (emphasis in original); see also Malley, 475 U.S. at 342 ("We reemphasize that our role is to interpret the intent of Congress in enacting § 1983, not to make a freewheeling policy choice, and that we are guided in interpreting Congress' intent by the common-law tradition.").

To follow the dissent's path and disregard both the Court's long stated approach, and the common law, when interpreting "a statute, enacted by Congress, which `on its face does not provide for any immunities,'" id., would indeed be in the dissent's words, "nothing but the rawest exercise of [judicial] power."

Judges Murnaghan, Ervin, Hamilton, and Michael join in this opinion.

LUTTIG, Circuit Judge, dissenting:

With today's evenly-divided decision to deny rehearing en banc in this case, In re: Allen, 106 F.3d 582 (4th Cir. 1997), every state official in this circuit who claims entitlement to qualified immunity must affirmatively prove, as a threshold burden to proving that he did not violate the plaintiff's clearly established federal constitutional or statutory rights, that he also did not exceed the scope of his authority under state law. And, now, every district court in such cases must first resolve whether the defendant state official acted within the scope of his state law authority, before proceeding even to address the heretofore only relevant question under Harlow v. Fitzgerald, 457 U.S. 800 (1982), of whether the defendant violated a clearly established federal constitutional or statutory right of which a reasonable official would have known. (Indeed, here, although the panel addresses itself for pages to the intricacies of West Virginia state law, it never even considers the question of whether McGraw violated BGB's clearly established constitutional or statutory rights in the course of denying McGraw's qualified immunity claim under section 1983, see 106 F.3d at 590 n.2.)

The panel's unanimous decision thus erects for our circuit an entirely new framework for analyzing qualified immunity claims by state officials -- on the strength of what even the panel can characterize at most only as isolated "statements" that qualified immunity protects only official action (none of which, even on its face, arguably supports the panel's holding) from several Supreme Court opinions (all of which pre-date Harlow and address absolute, not qualified, immunity). And, as if to add insult to injury, this new framework is created and imposed in a case in which the issue was not even presented, the district court having treated the issue only conclusorily. See Better Government Bureau, Inc. v. McGraw, 904 F.Supp. 540, 553 n.17 (S.D.W.Va. 1995). The panel thus addresses with a thirty page opinion an issue

mentioned passingly by the district court in only a footnote, and consigns to a footnote the district court's principal holding that there existed a factual dispute as to whether McGraw acted with the requisite retaliatory motive to violate the plaintiff's clearly established First Amendment rights, see Allen , 106 F.3d at 590 n.2 --and this, without even a note of explanation as to why it does not "simply follow the Supreme Court's mandate [that] when a district court denies summary judgment because of a purely factual question that decision is not immediately appealable." See Elliott v. Leavitt, 105 F.3d 174, 184 (4th Cir. 1997) (Motz, J., dissenting from denial of rehearing en banc).

In erecting this new framework within which state law is always relevant and often dispositive of a defendant's federal right to qualified immunity, the panel quite obviously misunderstands both section 1983 and the immunity defense of Harlow. Section 1983 provides a federal cause of action against persons acting under color of state law for conduct that violates federal rights. Under Harlow, official immunity is available as against this federal cause of action if the defendant official did not violate clearly established federal constitutional or statutory rights. Nothing else is required for entitlement to the defense and nothing else need be shown. Whether a defendant violated state law, whether he clearly violated state law, or whether he acted outside of state law, is never determinative of this federal immunity defense, because an official may lose his immunity only if he violates the statutory or other rights which give rise to the cause of action sued upon. Because the rights which give rise to the section 1983 cause of action are solely federal rights -- namely, the federal Constitution and federal statutes -- it follows that an official can never lose his immunity through the violation of state law (even clear state law), or even through the failure to act within that law. He forfeits his official immunity only through the violation of clearly established federal law, as Harlow held. State law may on occasion provide the basis for the right that

gives rise to a cause of action under section 1983, such as where it creates a property right protected under the due process clause, but state law does not, and can never, provide the right that gives rise to the cause of action under section 1983.

The Supreme Court so held in Davis v. Scherer, 468 U.S. 183 (1984), which the panel opinion does not even so much as cite. In Davis, the court of appeals had held that an official loses his qualified immunity if he violated clear state law, even if he did not violate clearly established federal constitutional or statutory rights, just as the panel held in the case sub judice that, regardless of whether an official violated clearly established federal rights, an official is not entitled to immunity if he acted outside the scope of his state law authority. The appeals court had reasoned, as did the panel in the present case, that the violation of clearly established federal rights was not the "sole way" to forfeit qualified immunity, see id. at 188, and it had failed, as did the panel here, even to discuss the issue of whether the officials violated the plaintiff's federal rights, id. at 189.

The Supreme Court reversed the court of appeals and held that a state official does not forfeit his qualified immunity even by violating clearly established state law, id. at 194. Rather, said the Court,

> [a] plaintiff who seeks damages for violation of constitutional or statutory rights may overcome the defendant official's qualified immunity only by showing that those rights were clearly established at the time of the conduct at issue.

Id. at 197 (emphasis added).

Notably, the Court began its opinion by reaffirming its holding in Harlow that, beyond "the `objective reasonableness of [an official's] conduct as measured by reference to clearly established law,'" "[n]o other `circumstances' are relevant to

the issue of qualified immunity." Id. at 191 (citation omitted; emphasis added). And it noted that, even before Harlow, its precedents "had made clear that, under the `objective' component of the good-faith immunity test, `an official would not be held liable in damages under § 1983 unless the constitutional right he was alleged to have violated was `clearly established' at the time of the violation." Id. at 194 (citations omitted; emphasis in original).

The Court acknowledged that the proposition that an official should lose his immunity by violating clear state law was "appealing," but, it reminded, in determining what factors are and are not to be considered in deciding qualified immunity claims, a choice must be made "between the evils inevitable in any available alternative." Id. at 195 (quoting Harlow, 457 U.S. at 813-14). The Court then went on to explain that such a submission, "if adopted, would disrupt the balance that [the Court's] cases strike between the interests in vindication of citizens' constitutional rights and in public officials' effective performance of their duties." Id.

Invoking reasoning that is equally dispositive of the question whether a state official loses his immunity by acting outside the scope of his state law authority, the Court stated categorically and unambiguously that officials sued for violation of rights conferred by a statute or regulation, like officials sued for violation of constitutional rights, do not forfeit their immunity by violating some other statute or regulation. Rather, these officials become liable for damages only to the extent that there is a clear violation of the statutory rights that give rise to the cause of action for damages. And if a statute or regulation does give rise to a cause of action for damages, clear violation of the statute or regulation forfeits immunity only with respect to damages caused by that violation. In the present case, as we have noted, there is no claim that the state regulation itself or the laws that authorized its promulgation create a cause of action for damages or provide the basis for an action brought under § 1983.

> . . . Neither federal nor state officials lose their immunity by violating the clear command of a statute or regulation -- of federal or of state law -- unless that statute or regulation provides the basis for the cause of action sued upon .

Id. at 194 n.12 (first emphasis in original) (second and third emphases added).

In fact, the entirety of the Court's reasoning in Davis is strikingly applicable to the claim that an official loses his federal immunity when he acts outside the scope of his state authority. In the course of identifying the "evils" that would follow upon making state law generally relevant to Harlow's federal qualified immunity inquiry, the Court went on to explain, for example, that, under appellee's submission [that an official is stripped of qualified immunity by violating a clear state statute or regulation], officials would be liable in an indeterminate amount for violation of any constitutional right--one that was not clearly defined or perhaps not even foreshadowed at the time of the alleged violation -- merely because their official conduct also violated some statute or regulation. And, in § 1983 suits, the issue whether an official enjoyed qualified immunity then might depend upon the meaning or purpose of a state administrative regulation, questions that federal judges often may be unable to resolve on summary judgment. Id. at 195 (first emphasis in original; second emphasis added). Even the policy considerations which the Court viewed as supportive of its holding apply with full force to the claim uncritically embraced by the panel. If Harlow's official immunity were to turn upon whether an official acted within his state law authority, [f]ederal judges would be granted large discretion to extract from various statutory and administrative codes those provisions that seem to them sufficiently clear or important to warrant denial of qualified immunity. Id. And just as surely would follow the additional burdens both for the federal courts and for those

officials who claim qualified immunity. As the Court observed:

> [S]uch judgments fairly could be made only after an extensive inquiry into whether the official in the circumstances of his decision should have appreciated the applicability and importance of the rule at issue. It would become more difficult, not only for officials to anticipate the possible legal consequences of their conduct, but also for trial courts to decide even frivolous suits without protracted litigation.
>
> . . . .
>
> Officials would be required not only to know the applicable regulations, but also to understand the intent with which each regulation was adopted. Such an understanding often eludes even trained lawyers with full access to the relevant legislative or administrative materials. It is unfair and impracticable to require such an understanding of public officials generally.

Id. at 195-96 & n.13.

Indeed, the evident burdens that will be imposed by the unprecedented new proof scheme put in place by the panel today, not only on those state officers who will claim qualified immunity but also on the courts of this jurisdiction which decide these claims daily, are enormous. The defendant officials of course will be required to marshal for presentation to the federal court all of the state statutes, regulations, and caselaw arguably relevant to the performance of their state law duties. And they will then be required to argue to the federal court, from those authorities, that they were acting within the scope of their state law duties, duties which often will not be defined with anything approaching the kind of specificity with which federal duties are defined.

The federal courts, for their part, will now be obliged to conduct what will essentially be mini-trials on the question of whether the defendant was acting within the scope of his

state law duties, a responsibility which will require these federal officers to immerse themselves in the intricacies of state statutes, regulations, and caselaw. The extent to which the federal courts will be embroiled in peculiarly state law questions is confirmed by the panel's holding in this case, that even the complete absence of state law prohibiting the conduct in question does not prevent the federal court from concluding that the state official exceeded the scope of his clearly defined state law authority. See Allen, 106 F.3d at 594-98.

It goes without saying that if the district court ultimately concludes that the defendant is acting outside the scope of his duties, or even that there is a dispute of material fact as to whether he was acting within or without his authority, then an interlocutory appeal of the district court's denial of qualified immunity will follow. Upon appeal, we will be required to parse the same body of state law in the course of our review of the district court's judgment. If we determine that the official did exceed the scope of his discretionary authority, then a trial on the merits of the plaintiff's claim will proceed.

And all of this before any court even considers the only heretofore relevant question for purposes of determining the availability of qualified immunity under section 1983 -- whether the defendant violated the plaintiff's clearly established federal rights .

Of course, wholly apart from the burdens imposed, the panel's novel holding will thrust the federal courts into the minutia of state and local governments, as the cumbersome litigation it spawns forces these courts to define -- often in the absence of state judicial authority and based upon what frequently will be vague laws -- the perimeters and contours of the duties of the myriad state and local officials subject to suit under section 1983. By deciding the decidedly federal question of official immunity by resort to case-by-case, common-law like adjudication of state scope-of-authority claims, the governmental structures of the state and local governments

within this circuit will, over time, become edifices constructed by the federal judiciary. The disposition of this case only serves to highlight this inevitable consequence of the panel's new framework. The panel confidently holds that the West Virginia Attorney General clearly exceeded his undisputed power to "establish a program" for the education of consumers when he "established a corporation" for such purpose, thus substituting its judgment, which is based upon a distinction that appears nowhere in any statute, regulation, or judicial decision of the State of West Virginia, for that of a man who previously served as a member of the West Virginia Supreme Court. The panel may be right or wrong as to the construction of the State Attorney General's powers that it superimposes on the State and its officials. However, to hold as a matter of law that the West Virginia Attorney General not only lacks such power, but that it is clearly established that he lacks such power, when he is expressly empowered to establish programs and nowhere forbidden to establish government corporations, is nothing but the rawest exercise of federal power.

That the panel has begun to appreciate the consequences of its holding for the federal courts and for the states is evident in its scrupulous avoidance of any discussion of the implications of that holding for either in its unusual opinion concurring in the denial of rehearing en banc. Indeed, in that opinion, the concurrence not only misleadingly avoids mention of state law, but revealingly buries its brief mention of the case over which the dissent has joined issue with the panel (Davis) in a lone paragraph at the very end of its opinion -- a paragraph in which the reasoning invoked by the Supreme Court in Davis is nowhere discussed and the case is presumptively distinguished on grounds of an unexplained (and, I believe, nonexistent) distinction between, on the one hand, a mere claim to qualified immunity "in the first instance," and an actual entitlement to qualified immunity which is subject to "defeat," on the other.

Indeed, the full extent to which the panel has departed from the principles that underlay the doctrine of qualified immunity, and especially the federalism principles implicated when state officials are named as party defendants, is made painfully clear in the concurrence's startling post hoc assertion that it now believes that Wyatt v.Cole, 504 U.S. 158 (1992), which was not even discussed in the panel opinion, is analogous to the case at hand and that, because of the purported distinction noted above, Davis, which also was not discussed in the panel opinion, "dealt with an entirely different question." Concurrence at 11; see also id. at 10 (noting also that Davis addressed only a single "discrete" question); compare id. with Wyatt, 504 U.S. at 168-69 ("The question on which we granted certiorari is[the] very narrow one" of whether private individuals enjoy qualified immunity under Harlow when "faced with § 1983 liability for invoking a state replevin, garnishment, or attachment statute.").

It would, of course, be difficult to imagine a case less like the case before us than Wyatt. In Wyatt, the Court held that private individuals were not entitled to public, or official , immunity -- that only public officials were entitled to official immunity -- because "the rationales mandating qualified immunity for public officials are not applicable to private parties." Id. at 167 (citations deleted). "[T]he qualified immunity recognized in Harlow acts to safeguard government, and thereby to protect the public at large, not to benefit its agents[,]" the Court observed, and "[t]hese rationales are not transferable to private parties." Id. at 167-68 (emphasis added). Elaborating upon the obvious distinction between private persons and public officials, which the concurrence today disavows, the Supreme Court explained that, [u]nlike school board members or Presidential aides, private parties hold no office requiring them to exercise discretion; nor are they principally concerned with enhancing the public good. Accordingly, extending Harlow qualified immunity to private parties would have no bearing on whether public officials are

able to act forcefully and decisively in their jobs or on whether qualified applicants enter public service. Moreover, unlike with government officials performing discretionary functions, the public interest will not be unduly impaired if private individuals are required to proceed to trial to resolve their legal disputes. In short, the nexus between private parties and the historic purposes of qualified immunity is simply too attenuated to justify such an extension of our doctrine of immunity. Id. at 168 (citations deleted). Because "[q]ualified immunity strikes a balance between compensating those who have been injured by official conduct and protecting government's ability to perform its traditional functions," id. at 167, Wyatt's holding denying qualified immunity to private persons plainly is of no relevance whatsoever to the question of whether a given state official is or is not entitled to such immunity -- a question whose resolution has profound consequences for the principles of federalism that inform application of the doctrine of qualified immunity to state officials subject to section 1983.

The concurrence's reliance upon the Supreme Court's recent decision in Clinton v. Jones, No. 95-1853, 1997 WL 273679 (U.S. May 27, 1997), is misplaced for essentially the same reasons. In invoking the Court's decision in Jones, and in particular its dicta that the Court has "never suggested that the President, or any other official, has an immunity that extends beyond the scope of any action taken in an official capacity," id. at *8, the concurrence once again fails to recognize the distinction between, and thus mistakenly equates, action within one's official capacity and action within one's scope of authority. In Jones, the Supreme Court was simply making the unexceptionable observation that when an individual who happens to be a public official acts not in his official capacity, but rather as a private individual (or an individual official who either is charged with conduct that occurred prior to the time when he assumed public office or prior to the time when he assumed federal office), he is not entitled to official immunity.

That, of course, is quite evidently different from the panel's holding that an official who acts in his official capacity but outside the scope of his duties is not entitled to immunity. Jones, in any event, is yet another case of absolute, rather than qualified, immunity relied upon by the panel and concurrence, and, at that, one which, in stark contrast to the case here, in no way raises the specter of federal judicial intervention into classic state law questions.

Nor, notwithstanding the concurrence's protestations, does the common law support the panel's holding. The common law authorities regarding trespass, malicious prosecution, and false imprisonment relied upon by the panel do not even address official immunity for unlawful actions. Even if they did, they would have limited applicability to modern qualified immunity, which, unlike absolute immunity, at this point bears little resemblance to the common law. As the Court in Wyatt explained, quoting Anderson v. Creighton, 483 U.S. 635, 645 (1987), Harlow "completely reformulated qualified immunity along principles not at all embodied in the common law." And, as Justice Kennedy further explicated in his opinion in that case, which the concurrence ironically relies upon here:

> Our immunity doctrine is rooted in historical analogy, based on the existence of common-law rules in 1871, rather than in "freewheeling policy choice[s]." In cases involving absolute immunity we adhere to that view, granting immunity to the extent consistent with historical practice. In the context of qualified immunity for public officials, however, we have diverged to a substantial degree from the historical standards.

Wyatt, 504 U.S. at 170 (Kennedy, J., concurring) (citations deleted).

Rather than acquiesce in today's unsupported and insupportable reformulation of Harlow's qualified immunity inquiry, I would grant the petition for rehearing en banc and dispose of the appellee's argument, that a public official loses his entitlement to federal qualified immunity if he exceeds the scope of his state law authority, in precisely the same way the Supreme Court disposed of the doctrinally indistinguishable claim that federal qualified immunity is lost if an official violates clearly established state law. I would acknowledge that "[o]n its face . . . the claim is not without some force," but I would "decline to adopt it," Davis, 468 U.S. at 194, because of its fundamental incompatibility with established qualified immunity doctrine and because of the unfathomable consequences that its acceptance would (and now will) have for a framework carefully designed by the Supreme Court to result in the expeditious resolution of suits against public officials for the reasonable exercise of their discretionary judgments.

Accordingly, I dissent from the court's decision to deny rehearing en banc.

Chief Judge Wilkinson and Judges Russell, Widener, Wilkins, and Williams join in this opinion.

The report or reports shall include a description of the examination and investigation procedures and policies of their offices, a statement of policies followed in deciding whether to investigate or examine the offices of credit suppliers subject to this chapter, a statement of the number and percentages of offices which are periodically investigated or examined, a statement of the types of consumer credit and consumer protection problems of both creditors and consumers which have come to their attention through their examinations and investigations and the disposition of them under existing law, and a general statement of the activities of their offices and of others to promote the purposes of this chapter.

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The dissent's assertion that the common law does not support our holding is made without citation to any authority. Similarly, the dissent's contention that after Harlow common law authorities are no longer applicable in determining whether qualified immunity applies, ignores Malley v. Briggs, Wyatt v. Cole, and Tower v. Glover, each of which postdates Harlow, and each of which states the Court's"well established" two part, common law test for determining "questions of immunity under § 1983." See Malley, 475 U.S. at 339; Wyatt, 504 U.S. at 163-64; id. at 175-76 (Rehnquist, C.J., dissenting); Tower v. Glover, 467 U.S. 914, 920-22 (1984). See also Heck v. Humphrey, 512 U.S. 477, 491-95 n. 1 (1994) (Souter, J., concurring).

TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE
PART IV. JURISDICTION AND VENUE
CHAPTER 81. SUPREME COURT

8 USCS § 1254 (1997)

§ 1254. Courts of appeals; certiorari; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

HISTORY: (June 25, 1948, ch 646, § 1, 62 Stat. 928; June 27, 1988, P.L. 100-352, § 2(a), (b), 102 Stat. 662.)

TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE
PART IV. JURISDICTION AND VENUE
CHAPTER 83. COURTS OF APPEALS

28 USCS § 1291 (1997)

§ 1291. Final decisions of district courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title [28 USCS §§ 1292(c), (d), 1295].

HISTORY: (June 25, 1948, ch 646, § 1, 62 Stat. 929; Oct. 31, 1951, ch 655, § 48, 65 Stat. 726; July 7, 1958, P.L. 85-508, § 12(e), 72 Stat. 348; Apr. 2, 1982, P.L. 97-164, Title I, Part A, § 124, 96 Stat. 36.)

TITLE 42. THE PUBLIC HEALTH AND WELFARE
CHAPTER 21. CIVIL RIGHTS
GENERALLY

42 USCS § 1983 (1997)

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

HISTORY: (R. S. § 1979; Dec. 29, 1979, P.L. 96-170, § 1, 93 Stat. 1284.) (As amended Oct. 19, 1996, P.L. 104-317, Title III, § 309(c), 110 Stat. 3853.)

§ 1125. False designations of origin and false descriptions forbidden

(a) Civil action. (1) Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading descript of fact, or false or misleading representation of fact, which--

(A) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person, or

(B) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities, shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.

(2) As used in this subsection, the term "any person" includes any State, instrumentality of a State or employee of a State or instrumentality of a State acting in his or her official capacity. Any State, and any such instrumentality, officer, or employee, shall be subject to the provisions of this Act in the same manner and to the same extent as any nongovernmental entity.

# AMENDMENTS

## AMENDMENT 1

Religious and political freedom.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

## AMENDMENT 14

Section 1. Citizens of the United States.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives -- Power to reduce apportionment.

Representative shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. Disqualification to hold office.

No person shall be a Senator or Representative in Congress, or Elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or

rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. Public debt not to be questioned -- Debts of the Confederacy and Claims not to be paid.

The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slaves; but all such debts, obligations, and claims shall be held illegal and void.

Section 5. Power to enforce amendment.

The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Article IV, Section 5 of the West Virginia Constitution

Section 5. Oath or Affirmation to Support the Constitution.

Every person elected or appointed to any office, before proceeding to exercise the authority, or discharge the duties thereof, shall make oath or affirmation that he will support the Constitution of the United States and the Constitution of this State, and that he will faithfully discharge the duties of his said office to the best of his skill and judgment; and no other oath, declaration, or test shall be required as a qualification, unless herein otherwise provided.

Article VII, Section 1 of the West Virginia Constitution

Article VII. Executive Department.

§ 1. The executive department shall consist of a governor, secretary of state, auditor, treasurer, commissioner of agriculture and attorney general, who shall be, ex officio, reporter of the court of appeals. Their terms of office shall be four years and shall commence on the first Monday after the second Wednesday of January next after their election. They shall reside at the seat of government during their terms of office, keep there the public records, books and papers pertaining to their respective offices and shall perform such duties as may be prescribed by law.

Article 7. Administration.

46A-7-102. Power of attorney general; reliance on rules of attorney general or commissioner of banking; duty to report.

(1) In addition to other powers granted by this chapter, the attorney general within the limitations provided by law may:

(a) Receive and act on complaints, take action designed to obtain voluntary compliance with this chapter or commence proceedings on his own initiative;

(b) Counsel persons and groups on their rights and duties under this chapter;

(c) Establish programs for the education of consumers with respect to credit practices and problems;

(d) Make studies appropriate to effectuate the purposes and policies of this chapter and make the results available to the public;

(e) Adopt, amend and repeal such reasonable rules and regulations in accordance with the provisions of chapter twenty-nine-a [§ 29A-1-1 et seq.] of this code, as are necessary and proper to effectuate the purposes of this chapter and to prevent circumvention or evasion thereof; and

(f) Delegate his powers and duties under this chapter to qualified personnel in his office, who shall act under the direction and supervision of the attorney general and for whose acts he shall be responsible.

(2) Except for refund of an excess charge, no liability is imposed under this chapter for an act done or omitted in conformity with a rule of the attorney general or commissioner, notwithstanding that after the act or omission the rule may be amended or repealed or be determined by judicial or other authority to be invalid for any reason. Any form or procedure which has been submitted to the commissioner and the attorney general in writing and approved in writing by them shall not be deemed a violation of the penalty provisions of this chapter notwithstanding that such approval may be subsequently amended or rescinded or be determined by judicial or other authority to be invalid for any reason.

(3) Except for refund of an excess charge, in any action brought pursuant to the provisions of this chapter, it shall be a defense that the act or omission complained of was in conformity with a published opinion of the attorney general issued in compliance with section one, article three, chapter five of this code or in conformity with an examination report issued by the commissioner to the person against whom the action is brought pursuant to section six [§ 31A-2-6], article two, chapter thirty-one-a of this code, or a declaratory ruling issued to the person against whom the action is brought pursuant to subdivision (9), subsection (c), section four [§ 31A-2-4(c)(9)] of said article.

(4) On or before the first day of December of each year, the attorney general and commissioner shall jointly or separately submit a report or reports to the governor and to the Legislature on the operation of their offices, on the use of consumer credit and on consumer protection problems in the state, and on the problems of persons of small means obtaining credit from persons regularly engaged in extending sales or loan credit. For the purpose of making such report or reports, the attorney general and commissioner are authorized to conduct research and make appropriate studies. The report or reports shall include a description of the examination and investigation procedures and policies of their offices, a statement of policies followed in deciding whether to investigate or examine the offices of credit suppliers subject

to this chapter, a statement of the number and percentages of offices which are periodically investigated or examined, a statement of the types of consumer credit and consumer protection problems of both creditors and consumers which have come to their attention through their examinations and investigations and the disposition of them under existing law, and a general statement of the activities of their offices and of others to promote the purposes of this chapter. (1974), c. 12; 1993, c.25.)

Supreme Court, U.S.
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No. 97-642

In The

# Supreme Court of the United States

October Term, 1997

DARRELL V. McGRAW, JR., Attorney General,
State of West Virginia,
Personally and in His Official Capacity,

*Petitioner,*

v.

BETTER GOVERNMENT BUREAU, INC.,
an Ohio Corporation,

*Respondent.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit**

## OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

The United States Court of Appeals for the Fourth Circuit declined to rehear *en banc* its decision affirming the United States District Court for the District of West Virginia's determination that West Virginia Attorney General Darrell V. McGraw, Jr. ("McGraw") is not entitled to summary judgment that he has "qualified immunity" from suit in this matter. The district court found that McGraw's alleged actions were clearly outside the scope of his statutory authority. It also found that the rights he allegedly violated were clearly established at the time he acted, and that a reasonable official would have known as much.

The questions presented for review[1] are:

1. Whether Petitioner waived his challenges to the qualified immunity analysis employed by the Fourth Circuit by never before raising them and explicitly conceding that the Fourth Circuit's analysis was consistent with Supreme Court authority?

2. Whether a government official is entitled to qualified immunity as a matter of law when (a) he clearly acted outside the outer limits of his authority as specified by applicable state statutes and case law, and (b) the district court and court of appeals found that a reasonable official would have known, and the official himself knew, that his acts were *ultra vires*?

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[1] As a threshold matter, it is unclear whether this Court has jurisdiction to review these questions. *See infra* page 1.

## LIST OF PARTIES AND RULE 29.6 STATEMENT

Petitioner is Darrell V. McGraw, Jr.

Respondent Better Government Bureau, Inc., an Ohio Corporation, has no parent company or non-wholly owned subsidiaries.

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## JURISDICTION

The opinion dissenting from the denial of the petition for rehearing *en banc* in this case raised the issue of whether this matter was properly subject to interlocutory appeal. Appendix to the Petition ("App.") 106. Judge Luttig observed that the panel did not provide

> even a note of explanation as to why it [did] not "simply follow the Supreme Court's mandate [that] when a district court denies summary judgment because of a purely factual question that decision is not immediately appealable."

*Id.* (citation omitted). Where the only matter determined by the district court was "whether the evidence could support a finding that particular conduct occurred," a district court's decision denying qualified immunity is not immediately appealable. *Behrens v. Pelletier*, 516 U.S. 299, 116 S. Ct. 834, 842 (1996). A district court's ruling is, however, immediately appealable to the extent that it "resolve[d] a dispute concerning an 'abstract issu[e] of law' relating to qualified immunity – typically, the issue whether the federal right allegedly infringed was 'clearly established.' " *Id.* (internal citations omitted); *see Johnson v. Jones*, 515 U.S. 304, 115 S. Ct. 2151, 2156-57 (1995).

A defect in the appellate jurisdiction of the court of appeals would eliminate the basis for this Court's jurisdiction under 28 U.S.C. § 1254. *See United States v. Nixon*, 418 U.S. 683, 691-92 & n.7 (1974). Consequently, the Court should not allocate its limited resources to this matter through a grant of certiorari without resolving that issue.

## STATEMENT OF THE CASE

### 1. Introduction

#### a. Better Government Bureau, Inc.

Better Government Bureau, Inc. ("BGB") was incorporated as an association of private businesses and citizens under Ohio law on August 18, 1993, under the trade name and service mark "Better Government Bureau, Inc." BGB later incorporated a chapter in Washington, and was attempting to incorporate a chapter in West Virginia at the time the dispute that led to this litigation arose. On behalf of its members, BGB monitors government activities and actively publicizes in various media its views about government policies affecting business. BGB does not sell anything, but instead provides association services to its members. At the time of the summary judgment motions, BGB had a membership of 47 businesses and 304 individuals from various states. BGB actively used its trade name and service mark in commerce following its incorporation in 1993 and prior to its entry into West Virginia in 1994.

#### b. Incidents Leading to the Instant Dispute

A BGB member, Suarez Corporation Industries ("SCI"), complained to BGB about actions taken by West Virginia Attorney General Darrell V. McGraw, Jr. ("McGraw"), concerning SCI's advertising practices. Because McGraw's office refused to respond to BGB's inquiries and requests under West Virginia's Freedom of Information Act, BGB broadcast on three Charleston, West Virginia-area radio stations on September 8, 1994, an

announcement soliciting information from the public for its investigation of McGraw. Two weeks later, in an interview with the *Charleston Gazette*, BGB's president announced BGB's plan to open a Charleston office and form a West Virginia chapter. The newspaper article quoted the BGB president's criticism of McGraw.

To do business in West Virginia, BGB was required to either incorporate under West Virginia law, or obtain approval from the West Virginia Secretary of State before doing business in the state as a foreign corporation. During the first week of October, 1994, as a first step toward its intended incorporation of a West Virginia chapter, BGB's attorney filed an application for a certificate of authority to do business. That application was rejected, however, because unbeknownst to BGB, one week earlier McGraw had incorporated his own West Virginia corporation called the "Better Government Bureau, State of West Virginia, a government agency corporation" ("McGraw's corporation").[2] McGraw's incorporation precluded the Secretary of State from granting BGB's application under West Virginia law.

On October 12, 1994, BGB wrote separately to McGraw and Secretary of State Ken Hechler explaining that BGB was the first user of the trade name and service mark "Better Government Bureau" and requested them to take steps to allow BGB to register to do business in West

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[2] The Petitioner's and Fourth Circuit's statements (Pet. at 5 and App. 7, respectively) that BGB's application to do business as a foreign corporation in West Virginia came "[a]bout a month" after McGraw's incorporation are in error. *See* App. 59-60.

Virginia under its trade name and service mark. Hechler responded the following day, explaining that he would not comply with the request, and suggested BGB's actions in the absence of registration should prompt BGB to "consult with [its] attorney." McGraw did not respond to BGB's letter. BGB later learned the facts surrounding McGraw's decision to take BGB's name for his own "corporation."

### c. McGraw Directed the Intentional "Stealing" of BGB's Name

On September 30, 1994, shortly following BGB's public criticism of McGraw and its announcement that it intended to open a chapter and engage in political activities in West Virginia, McGraw instructed one of his employees, Lila Hill, to reserve the name "Better Government Bureau" with the Secretary of State's Office. Ms. Hill complied with these instructions, incorporating McGraw's corporation on September 30, 1994.

The idea to reserve BGB's trade name and service mark with the Secretary of State came from the spouse of a staff attorney in McGraw's office who suggested that the Attorney General's Office "steal" the trade name and service mark, and form a West Virginia corporation under that name before BGB could do so.[3] McGraw encouraged the conduct, as he explained at deposition: "I was glad my people were being innovative and I was glad that

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[3] Ms. Hill's notes of the conversation state: "Steal name – form Better Government Bureau before they have a chance to do so." App. 60 n.3.

they were thinking good. And so I didn't discourage it, but I rather encouraged it."

Ms. Hill's initial attempt to "steal" BGB's name was unsuccessful. The Secretary of State's Office had placed an "administrative flag" on the words "Better Government Bureau," meaning that anyone who attempted to register the name was required to meet with Donald Wilkes, Director of the Secretary of State's Corporations Division. Consequently, the clerk would not accept Ms. Hill's application to reserve BGB's name.

Ms. Hill returned to McGraw, informed him of what had happened, and was instructed by McGraw to return to the Secretary of State's Office and to speak with Secretary of State Hechler directly. After she did so, the Secretary of State's Office allowed McGraw to reserve "Better Government Bureau." Later that day, after Ms. Hill and McGraw completed the incorporation forms, McGraw paid the incorporation fee himself, with a personal check.

McGraw has asserted that he innocently established his corporation in order to educate consumers, and that he happened to choose the name "Better Government Bureau" because he liked the "ring" of that name. The record is devoid of evidence, however, that McGraw's corporation has done anything since its incorporation on September 30, 1994, except to obtain a telephone listing. McGraw admits as much in his Petition. Pet. at 5. And, as explained below, McGraw's choice of a name that would have the effect of blocking BGB from incorporating under its own name was more than happenstance.

**d. Significant Documents Were Not Disclosed**

Two documents, which were not disclosed in discovery before the district court, further undermine McGraw's position that he acted innocently in creating his corporation.

The first document is a September 26, 1994, memorandum from Assistant Attorney General Daynus Jividen to Secretary of State Hechler pursuant to McGraw's personal direction. App. 83 (full text). The memorandum advised Hechler that BGB "will shortly seek registration" and asked Hechler "to resist and refuse such registration. . . . " *Id.* Jividen also requested that Hechler advise him when BGB attempted to register.

The second document is a September 27, 1994, memorandum from Hechler responding to Jividen's memorandum, following a "personal discussion with the Attorney General." App. 85 (full text). Hechler observed that he did "not recall any instance when any organization has been denied registration because of its political activity." *Id.* He also explained "that when an organization is in good standing in our neighboring state of Ohio, that makes it very difficult to deny registration in West Virginia." *Id.* He thus advised Jividen that the "issue of resisting and refusing such registration is more complicated [than] I at first imagined." *Id.*

Neither memorandum referred to any concern McGraw had with respect to the need for a corporation to promote consumer education. Despite their obvious relevance to the litigation, the documents were never

produced until a secretary turned the Jividen memorandum over to BGB long after discovery had closed, and while the matter was on appeal, after the secretary learned that the memorandum had not been turned over in discovery. In explaining the documents' nonproduction, McGraw claimed that the secretary had taken the only copy of the Jividen memorandum from the file, and that everyone had forgotten about it, notwithstanding the fact that it had been created only a few weeks before BGB filed its lawsuit. McGraw has never explained why he did not produce the Hechler response memorandum until after the secretary turned over the Jividen memorandum. McGraw subsequently fired the secretary.

**e. McGraw Encouraged Other Attorneys General to Engage in Similar Conduct**

On October 4, 1994, McGraw sent a letter to fifty-three attorneys general encouraging them to steal BGB's name in their jurisdictions. App. 61. The letter stated, in part: "To foreclose the possibility of such a corporation operating in your State, you may want to register the name of the Better Government Bureau as an agent for the Attorney General's office with the Secretary of State's Office or take other preventative measures." *Id.*

Two days later, McGraw sent a similar letter to the same recipients, adding the following:

> When you come up against these people [referring to BGB's member, SCI], you should know that there is a possibility that their *modus operandi* might include a proclivity to violence.

> Please recall my recent letter, in which I recommended that you protect the name Better Government Bureau in your State, otherwise when you act to protect your consumers you will be attacked by a Better Government Bureau for doing so.

*Id.* McGraw later conceded the attacks to which he referred were, at least in part, BGB's "negative" comments directed at him and his office through the media. *See* App. 86. He stated further that BGB's statements directed at him and members of his office constituted "obstruction of justice" merely because the statements were "intended to modify the behavior of public officials." *Id.*

**f. McGraw Used Confusion About the Names to Harm BGB**

McGraw used the similarity of the parties' marks to the detriment of BGB. The United States Postal Service delivered mail intended for BGB to McGraw's corporation. App. 62 n.5. Rather than forward the mail, an official in McGraw's office sent the mail to the Postal Service and suggested that the Postal Service assist McGraw's office in an investigation of BGB's use of the mails. *Id.*

Directory assistance operators have occasionally misdirected BGB's callers to the listing for McGraw's corporation. *Id.* An official in McGraw's office wrote to the telephone company and asked it to list BGB in a different fashion to reduce "the likelihood of confusion." *Id.*

**2. The Proceedings Below**

BGB filed this action on October 28, 1994, alleging that by forming a corporation using BGB's trade name and service mark, McGraw, acting in his personal and official capacities, violated BGB's rights under the constitutions of the United States and West Virginia, the Lanham Act, and common law protection for trade names and service marks. Following the completion of discovery, the parties cross-moved for summary judgment on all claims.

On October 16, 1995, the district court denied McGraw summary judgment on his qualified immunity defense with respect to the personal capacity claims.[4] App. 56, 57, 79. The district court held that BGB's allegations, and even some undisputed matters of record, supported a claim that "McGraw retaliated against BGB and attempted to thwart BGB's operational efforts so as to stem the latter's continued criticism of him." App. 73. The district court held that the law was clearly established at the time of McGraw's alleged actions "that a public official could not engage in retaliatory conduct designed to hamper or thwart a citizen's rights to free speech under the federal and state constitutions." *Id.* The

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[4] In addition, the district court affirmatively granted BGB summary judgment on the qualified immunity issue, App. 56, 57, 79, granting in part BGB's motion for summary judgment, which had thoroughly briefed the defense. McGraw acknowledged before the Fourth Circuit that the district court "grant[ed] summary judgment to [BGB], on the issue of qualified immunity." Brief of Appellant at 1-2. The Court should disregard the panel's cursory suggestion to the contrary, *see* App. 29 n.6, as plain error and *dicta*.

court noted that McGraw virtually conceded the point. App. 76. The district court concluded that a reasonable official in McGraw's position would have known that his conduct violated BGB's rights. App. 77-78. On this basis, the district court denied McGraw's claim of qualified immunity.

In a footnote, the district court stated "a second reason" why McGraw was not entitled to qualified immunity: "His actions were beyond the permissible realm of his discretionary duties and thus outside his scope of authority." App. 78. McGraw appealed the ruling that he was not entitled to qualified immunity.

While the appeal was pending before the Fourth Circuit, BGB learned of the existence of the two highly relevant documents that were neither identified nor produced in discovery. The Fourth Circuit remanded the matter for purposes of supplemental discovery and briefing on the qualified immunity issue.

On April 25, 1996, the district court issued a supplemental opinion, noting that the new evidence "provide[d] strong additional support for the Court's qualified immunity analysis." App. 82. For example, the court found that the two newly disclosed documents "give rise to a strong inference that . . . McGraw's actions were aimed at burdening the political speech BGB aimed at McGraw and his staff." App. 88. Moreover, the court found that "the alleged innocent non-production . . . is very difficult for the Court to credit" and it undermined McGraw's assertion that he had an innocent motive in establishing his

corporation. App. 88-89. Consequently, the court reinstated its prior holding that "McGraw is not entitled to qualified immunity." App. 89. McGraw again appealed.

A panel of the Fourth Circuit unanimously affirmed the district court's denial of summary judgment to McGraw on the basis that he "engaged in activity a reasonable official in his position would have known was clearly established to be beyond the scope of his authority." App. 4. The panel held that "an official should only be held to be acting beyond the limits of his authority when he commits acts 'clearly established' to be beyond the scope of that authority." App. 17.

The panel explained that "[t]his test is objective, and examines what a reasonable official in the defendant's position would have understood the limits of his statutory authority to be." App. 18; *see* App. 21.[5] The panel also emphasized that this test would apply only in a very small class of cases "because most § 1983 claims involve conduct that relates to, or flows from, conduct that the official is indeed authorized to commit." App. 20.

Applying that test, the panel explained:

> [T]he proper inquiry in the instant case is whether McGraw's action – forming his own "government agency" corporation under the auspices of the Attorney General's Office – was clearly established to be beyond the scope of his

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[5] Thus, contrary to Petitioner's assertion, this case does *not* present the prospect of a loss of qualified immunity when an official's "misapprehension or misjudgment as to the scope of his or her authority is *negligently* or innocently done." Pet. at i (emphasis added).

> authority. The issue is *not* whether McGraw exceeded the scope of his authority by forming this corporation in retaliation for speech critical of him.

App. 22-23. The panel turned to state law to answer the inquiry:

> West Virginia law narrowly circumscribes the powers of the Attorney General. Indeed, McGraw himself so held in an opinion he authored as a justice of the Supreme Court of Appeals of West Virginia. *See Manchin v. Browning*, 296 S.E.2d 909, 914-17 (W. Va. 1982). *Manchin* held that under West Virginia law "the powers and duties of the Attorney General" are limited to those "specified by the constitution and by rules of law prescribed pursuant thereto." . . .
>
> . . . No West Virginia law expressly grants the Attorney General the right to establish a corporation, let alone a "government agency" corporation under the auspices of the Attorney General's office, and no West Virginia Attorney General has ever done so. McGraw concedes this.

App. 24.[6] The panel rejected McGraw's arguments that his oath of office and his statutory authorization to "[r]eceive and act on complaints . . . [and] [e]stablish programs for the education of consumers" empowered him to create his own "government agency" corporation. App. 25, 26-27. The panel pointed out that West Virginia's highest court in *State ex rel. Fahlgren Martin, Inc. v.*

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[6] McGraw raised no argument on rehearing or before this Court that the panel misinterpreted West Virginia law.

*McGraw*, 438 S.E.2d 338 (W. Va. 1993), has emphasized that " 'the powers of the Attorney General [in West Virginia] are strictly defined by Constitution and statute.' " App. 27. The panel further stated that West Virginia law clearly established that "the West Virginia legislature, rather than its executive branch (or any member of that branch), is the body vested with the power to create government corporations." App. 28. The panel thus concluded that "McGraw performed an act a reasonable official in his position would have known was clearly established to be beyond the scope of his official duties." App. 29. The panel expressly did *not* address the district court's finding that "BGB alleged a violation of clearly established First Amendment rights, and that a reasonable person in McGraw's position would have known that his alleged conduct violated these rights." App. 13 n.2.

McGraw petitioned for rehearing and suggested rehearing *en banc*. McGraw's only argument for rehearing was that the panel did not address expressly the vitality of the Fourth Circuit's decision in *McElveen v. County of Prince William*, 725 F.2d 954 (4th Cir.), *cert. denied*, 469 U.S. 819 (1984).

On July 17, 1997, the Fourth Circuit denied rehearing. App. 91, 94. The judges concurring in the denial of rehearing *en banc* observed that McGraw "expressly conceded" that the qualified immunity test applied by the panel is consistent with Supreme Court authority. App. 94-95. They also noted that the judges dissenting from rehearing addressed "a basis never suggested by McGraw." App. 95.

On September 9, 1997, the district court stayed further proceedings. McGraw's petition for a writ of certiorari followed.

## REASONS FOR DENYING THE WRIT

Realizing that he had no recourse under the consumer protection statutes of West Virginia to prevent BGB's critical speech, McGraw decided to take matters into his own hands by colluding with the Secretary of State to create a sham "corporation" for the purpose of blocking BGB from legally forming a chapter in West Virginia under its own name. McGraw's claim that he is entitled to qualified immunity for this flagrant abuse of power is not a matter worthy of this Court's review.

### 1. Petitioner Waived The Arguments Now Presented To This Court

McGraw has not previously advanced, in either the district court or the court of appeals (on the merits or on rehearing), his arguments based on an unprecedented interpretation of *Davis v. Scherer*, 468 U.S. 183 (1984). Rather, his Petition adopts, and in fact quotes at length from, the opinion dissenting from the denial of rehearing *en banc*. *See* Pet. 11-12, 15, 18. As Judge Diana Gribbon Motz, the author of the Fourth Circuit's decision on the merits, pointed out, the dissenting judges argued for rehearing "on a basis never suggested by McGraw or adopted by *any* court." App. 95. Thus, BGB has never had an opportunity to address the issues Petitioner raises for the first time here. Nor did any court below decide the

issue Petitioner raises here, *see United States v. Williams*, 504 U.S. 36, 39 (1992), as the arguments were first raised *sua sponte* by the judges dissenting from the denial of rehearing. *Cf. Hoover v. Ronwin*, 466 U.S. 558, 574 n.25 (1984) (Court is precluded from considering argument raised for first time on rehearing). Petitioner's failure to raise his arguments in a timely manner precludes this Court's consideration of them. *California v. Taylor*, 353 U.S. 553, 556 n.2 (1957); *EEOC v. FLRA*, 476 U.S. 19, 24 (1986).

**2. Petitioner Limits His Challenge To Only One Of The Alternative Bases That Support The Denial Of Summary Judgment On McGraw's Qualified Immunity Defense**

The district court relied on two alternative bases to find that McGraw was not entitled to summary judgment on his claim of qualified immunity. McGraw's petition to this Court addresses only one of those bases. Consequently, even if the Court issued the writ and answered Petitioner's questions in the affirmative, those answers would not dictate a different result below. *Whitley v. Albers*, 475 U.S. 312, 326 (1986) ("any ground properly raised below may be urged as a basis for affirmance of the Court of Appeals' decision") (quoting *United States v. New York Tel. Co.*, 434 U.S. 159, 166 n.8 (1977)). Because McGraw presents no challenge to the district court's alternative ruling, *i.e.*, that McGraw violated clearly established rights of which a reasonable official would have known, the Court should decline to issue the writ directed only to the ruling regarding the scope of McGraw's authority.

### 3. Petitioner Identifies No Conflict Or Confusion Among The Circuits

Petitioner does not assert that there is a division among the circuits. At most, he argues that some circuit court precedents are not being consistently followed within those circuits. Pet. at 23-26. That is not a matter that requires this Court's involvement. Moreover, the cases Petitioner identifies are consistent with and supportive of the panel's decision in this case.

The cases Petitioner cites uniformly recognize that officials are not entitled to qualified immunity for actions taken outside the scope of their authority, and that the determination of the proper scope of authority is independent from a determination of whether the official violated clearly established rights. *See Shechter v. Comptroller of New York*, 79 F.3d 265, 268-69 (2d Cir. 1996) (no qualified immunity unless "the conduct of which the plaintiff complains falls within the scope of the defendant's official duties," *and* official "did not violate . . . clearly established statutory or constitutional rights"); *Merritt v. Mackey*, 827 F.2d 1368, 1373 (9th Cir. 1987) (no qualified immunity when officials *either* "knowingly acted outside the scope of their authority," *or* "violated [plaintiff's] clearly established constitutional rights"); *Lenz v. Winburn*, 51 F.3d 1540, 1545 (11th Cir. 1995) (official must "act[] within the scope of her discretionary authority,"[7] and *even if* within scope, will not be entitled to qualified immunity if she "violated . . . clearly

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[7] "A governmental official acts within her discretionary authority if the actions were (1) 'undertaken pursuant to the performance of [her] duties' and (2) 'within the scope of [her] authority.' " *Lenz*, 51 F.3d at 1545 (internal citations omitted).

established statutory or constitutional rights"); *Lassiter v. Alabama A & M Univ., Bd. of Trustees*, 28 F.3d 1146, 1149 (11th Cir. 1994) (same two-part test); *A.M. v. Grant*, 889 F. Supp. 1495, 1506-08 (M.D. Ala. 1995) (same), *aff'd*, 68 F.3d 486 (11th Cir. 1995) (unpublished table decision). None of the other cases cited by Petitioner address a situation where there was any allegation that the official acted outside the bounds of his discretion.

Moreover, none of the cases Petitioner cites hold that case law is the only means to make a right clearly established. The Ninth Circuit looked to formal personnel policies as well as decisional law in making its determination in *Merritt*, 827 F.2d at 1373. The Eleventh Circuit, under the first prong of its analysis, looked to state statutes, administrative regulations, and the applicable training manual in *Lenz*, 51 F.3d at 1546-47 & n.4, 1551 & n.12. These courts never suggested that case law was the only acceptable means to define the scope of officials' authority. Nor did they indicate that in the absence of case authority, the officials were unfettered. *See also Lassiter*, 28 F.3d at 1150 n.4 (acknowledging that a statute or even a constitutional provision could "be specific enough to establish the law . . . to overcome qualified immunity even in the absence of case law."); *A.M.*, 889 F. Supp. at 1506-08 (looking exclusively to state statutes to decide whether official's conduct was authorized). The only language in Petitioner's cases suggesting otherwise was in situations where no statute or regulation was at issue before the courts, and thus those cases are easily distinguishable.

In *Francis v. Coughlin*, 891 F.2d 43 (2d Cir. 1989), although the court stated that one of its inquiries was to

look to decisional law for a clearly established right, on each of the issues presented there, the court's own case law definitively answered the question. There was no need to look to other sources of law. *See id.* at 46, 47, 48; *see also Pisello v. Town of Brookhaven*, 933 F. Supp. 202, 218-19 (E.D.N.Y. 1996) (stating that action at issue need *not* have been previously held unlawful, but rather "the unlawfulness must be apparent in light of preexisting law"); *Wise v. New York City Police Dep't*, 928 F. Supp. 355, 370, 373 (S.D.N.Y. 1996) (undisputed that case law resolved the issue). In *Zappala v. Albicelli*, 954 F. Supp. 538 (N.D.N.Y. 1997), the court found no clearly established right, without addressing whether some non-decisional law would be adequate to establish the right. *Id.* at 544-45.

Moreover, the alleged violations at issue in *Francis*, as in *Shechter*, 79 F.3d at 271, rested on the due process clause alone, unlike the present situation. Even if rights under constitutional due process may require case law to be "clearly established," it does not follow that any case law is required here.

The absence of any division of authorities on the precise questions presented suggests that this matter does not warrant this Court's attention.[8]

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[8] Petitioner cites *Horta v. Sullivan*, 4 F.3d 2 (1st Cir. 1993), but does not identify any inter- or intra-circuit division with that authority.

**4. This Case Arises On Unique Facts And Raises No Issue Of National Significance**

This case does not present a situation where it is alleged that a government official violated the plaintiff's rights in the manner in which he exercised his discretion, but rather the rare situation that the official was acting clearly outside the outer limits of his discretionary authority. Moreover, contrary to Petitioner's suggestion, this case does not present a situation where McGraw failed to establish his entitlement to qualified immunity because his "misapprehension or misjudgment as to the scope of his . . . authority [was] negligently or innocently done." Pet. at i. Rather, both the district court and the panel determined that a reasonable official in McGraw's position would have known he was clearly beyond the outer scope of his authority. Thus, because of the unique and unprecedented factual circumstances of this case, it is not "an important question of federal law" that warrants the Court's attention. Sup. Ct. R. 10(c).

**5. This Case Does Not Depart From This Court's Precedents**

McGraw's argument that the panel's decision departs from *Davis v. Scherer*, 468 U.S. 183 (1984), disregards the different factual situation of this case from that presented in *Davis*. While McGraw unreasonably extends the Court's holding in *Davis*, the instant case is similar to and consistent with *Butz v. Economou*, 438 U.S. 478 (1978).

In *Davis*, the plaintiff brought suit alleging that the defendants "had violated the Due Process Clause of the

Fourteenth Amendment by discharging appellee from his job without a formal pretermination or a prompt post-termination hearing." *Davis*, 468 U.S. at 187. There was no allegation that the defendants lacked authority to dismiss Scherer, only that they did so in a manner that violated due process. The Court held that the authority exercised in *Davis* "remain[ed] discretionary however egregiously it [was] abused." *Id.* at 196 n.14.

In the present case, the panel's reasoning was not that McGraw is liable because in the course of his duties he exercised his discretion in a manner that violated state law. Rather, the panel addressed the situation where state law did not provide McGraw with any discretion whatsoever because his duties did not extend to the matter in question.

This Court recognizes the importance of the type of distinction between this case and that in *Davis*, and has concluded that "it is not unfair to hold liable the official who knows or should know he is acting outside the law." *Butz*, 438 U.S. at 506; *see also id.* at 493 n.18 ("an executive officer would be vulnerable if he took action 'manifestly or palpably' beyond his authority or ignored a clear limitation on his enforcement powers").

Moreover, the panel's decision in this case is supported by the common law. The Court has previously explained the importance of common law in an immunity analysis:

> Our initial inquiry [regarding immunity under 42 U.S.C. § 1983] is whether an official claiming immunity under § 1983 can point to a common-law counterpart to the privilege he asserts. If an official

> was accorded immunity from tort actions at common law when the Civil Rights Act was enacted in 1871, the Court next considers whether § 1983's history or purposes nonetheless counsel against recognizing the same immunity in § 1983 actions.

*Malley v. Briggs*, 475 U.S. 335, 339-40 (1986) (internal citations and quotation omitted); *see Wyatt v. Cole*, 504 U.S. 158, 163-64 (1992). In 1871, when Congress enacted section 1983, government officials had no immunity for acts that were outside the scope of their authority. *See Butz*, 438 U.S. at 489-90; *Bates v. Clark*, 95 U.S. 204, 209 (1877) (rejecting official's argument of no liability where they "were utterly without any authority in the premises").

As *Butz* makes plain, the panel's decision does not conflict with this Court's precedents, it follows them.

## CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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